BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

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)

REPLY COMMENTS OF UTILITY REFORM PROJECT, ET AL. ON THE PROFFERED QUESTION REGARDING REMEDIES

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Several comments (some styled as "briefs") have misconstrued the question presented. The question is:

> What, if any, remedy can the Commission determine and provide 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?

Instead, some commenters have treated this proceeding as if it were now a rulemaking proceeding to determine a generic policy about rate reductions or refunds after a Commission rate order has been overturned by the courts. Others seek to discuss not what remedy the Commission can determine and provide to ratepayers but what remedy-blocking service the Commission can provide to the utility by means of "retroactive ratemaking." Both fields of inquiry are beyond the scope of the stipulated question, and those comments should be stricken.

A "remedy" is "something that corrects or removes an evil of any kind." RANDOM HOUSE UNABRIDGED DICTIONARY (2006). It is "the means of enforcing a right or preventing or redressing a wrong." BLACK'S LAW DICTIONARY (8th ed. 2004). A "remedy" is not devising a method not to correct an evil or redress a wrong. That is the opposite of a "remedy."

Also, no commenters other than the Class Action Plaintiffs (CAPs) identified the distinct strands of the filed rate doctrine and the rule against retroactive ratemaking. We expect those other commenters to address those strands today, as they have an opportunity to respond to the arguments made by the CAPs. But such new comments today leaves us with no opportunity to respond to whatever positions on these strands

are presented by the other commenters. If the others present new positions on these strands, then we will request an opportunity for reply.

URP now agrees with the CAPs and Staff that the OPUC does not have authority to order PGE to provide rate reductions or refunds for the amounts at issue.

I. RESPONSES TO STAFF OPENING BRIEF.

While the Staff Opening Brief appears to stick mostly to the certified question, it has a perverse undercurrent that surfaces toward the end of the brief. The undercurrent is the notion that ratepayers cannot get their money back, after the utility imposes upon them charges that the courts have determined to be unlawful. The certified question pertains to the authority of the Commission, not to the other ways for such ratepayers to get their money back. So, while we largely agree with Staff's conclusion that the Commission does not have authority to order refunds in this instance, we do not agree with the undercurrent that the ratepayers who paid the unlawful charges cannot get their money back by other avenues, such as a civil suit under ORS 756.185, the road approved in ***Dreyer***.

Staff (p. 3) cites ***McPherson*** for its conclusions about authority to award reparations for charges paid under rates "later found to be unjust and unreasonable." Here, however, the courts have determined that the rates charged by PGE during the 5.5-year period contained unlawful charges, which presents a different issue. Note that Staff repeatedly refers to rates being "unjust and unreasonable," but that is not relevant to the certified question.

Staff (p. 7) notes that somehow the Commission would have to "consider whether such refunds would violate any *constitutional* provisions, such as whether "ordering refunds of the 'return on' Trojan that PGE received could result in confiscatory rates." First, since Staff concludes that the Commission has no authority to order refunds, no constitutional need be reached. Second, if PGE has a constitutional "takings" claim (as the result of being compelled to pay damages to the ratepayers who paid the unlawful charges), then PGE would have to file that claim against the State, and that claim would have nothing do to with ratemaking.

Staff (pp. 8-9) advances the notion that ratepayers "should know what a utility service costs him at the time he takes it," as "the posted tariff on the day of service represents a contract between the customer and the utility." That notion is nowhere in Oregon statutes, but it is not inconsistent with the existence of court-awarded damages to the ratepayers who paid the unlawful charges. As ***Dreyer*** concluded, utility rates are not known with certainty to be lawful or unlawful, until judicial review has been completed. Further, the mere existence of a contract in no way precludes any party to the contract from suing the other party for damages later. The real implied contract between ratepayers and the utility is that the utility charge lawful rates. A breach of that contract gives rise to lawsuits for damages, just like the breach of any contract.

As for an implied "regulatory compact," the need for certainty in the conduct of regulated monopolies is distinct from the notion of a "regulatory compact." The compact is supposed to protect the consumers, who individually have no bargaining

power. The compact in this case includes the statutory framework for the performance of the "regulatory compact," which includes ORS 757.200, in the same manner that Oregon law includes terms such as duty of fair dealing or implied warranties into other contracts.

It is generally said that the regulated utilities and ratepayers are part of the "regulatory compact" whereby the utility owes a duty to speak truthfully and fully to the regulator in return for the benefits it receives from lack of market competition. The regulator determines "just and reasonable" rates including an increment for profit and this compact replaces the need for individual contracts for service with each ratepayer. Individual ratepayers, who have no bargaining power against a monopoly utility, do not have to "bargain for" electric rates and in fact cannot do so.

This "compact" is not an impediment to stating claims which arise from breaches of statutory and common law duties. ***Harper v. Interstate Brewery Co.***, 168 Or 26, 120 P2d 757, (1942); ***Georgetown Realty v. The Home Ins. Co.***, 313 Or 97, 106, 831 P2d 7 (1992); ***Conway v. Pacific University***, 324 Or 231, 237, 924 P2d 818, 821 (1996). Each opinion instructs that, when a contract exists, claims which arise from duties not expressly arising from the contract are not precluded. Oregon law allows suits by customers for return of sums they have been overcharged by a retailer. Oregon law specifically allows suits against regulated utilities for illegal charges, as recognized in ***Dreyer***.

Staff (pp. 10-11) claims that a remedy for ratepayers paying unlawful rates is to obtain a stay of those rates from the Circuit Court under former ORS 756.580. But then Staff goes overboard and claims that "a stay is the only remedy the Legislature has authorized to protect ratepayers from paying rates that the Commission has approved (or allowed to go into effect)." It is technically true that the stay is the only remedy to protect ratepayer "from paying rates that the Commission has approved," regardless of their legality. But that does not foreclose ratepayers from the alternative remedy of getting their money back by means of lawsuits against the utility for damages (pursuant to ORS 756.185 and ORS 756.200), as has been conclusively decided in ***Dreyer***.

Staff (pp. 12-13) quotes at length from ***United Rural Electric Membership Corp. v. Indiana Michigan Power Co.***, 648 NE 2d 1194 (Ind App 3 1995), where an intermediate appellate court ruled that the coop did not have a damages claim against the private utility for the latter having provided service to General Motors Corp. for 6 years outside of the latter's valid service territory. First, this case is not relevant to the question presented, which is the authority of the Commission to provide remedies to ratepayers. Of course, the coop was not a ratepayer of the regulated utility. Second, the question of whether Oregon ratepayers have damages actions under ORS 756.185 against utilities that have charged unlawful rates has been decided in ***Dreyer***.

Staff (pp. 13-14) quotes from ***Keco Industries v. Cincinnati & Suburban Bell Telephone Co.***, 166 Ohio St 254, 141 NE2d 465, *cert denied*, 355 US 182, 78 SCt

267, 2 LEd2d 187 (1957). First, ***Keco*** does not address the question in this proceeding and certainly did not address whether "a utility would offer refunds to customers," as Staff states.

> The question presented by this appeal is whether an action for restitution based on the ground of unjust enrichment lies to recover the increase in rates charged by a public utility under an order of the Public Utilities Commission, where such order is subsequently reversed by the Supreme Court on the ground that it is unreasonable and unlawful.

Keco, 141 NE2d at 467. The court concluded that the Ohio Legislature had "completely abrogated the common-law remedy of restitution in such cases." ***Keco***, 141 NE2d at 469. Ohio does not have a statute similar to ORS 756.200, which expressly preserves common law remedies against utilities, as the Court concluded in ***Dreyer***. Again, the undercurrent in the Staff Opening Brief is surfacing. This case, among others, addresses the question of whether ratepayers have remedies other than Commission-ordered refunds. That is not the certified question presented here.

In ***Green Cove Resort I Owners Association v. Public Utilities Commission of Ohio***, 103 Ohio St 3d 124, 130, 814 NE2d 829 (2004), however, the court did rule: "Neither the commission nor this court can order a refund of previously approved rates." 814 NE2d at 834.

Staff (p. 14) cites ***Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.***, 2 Ill2d 205, 117 NE2d 774 (1954). We agree this case is relevant and offer this most pertinent excerpt:

> The common-law right to recover reparations for unreasonable charges by public utilities has been superseded by statutory provisions. ***Terminal***

Railroad Ass'n v. Public Utilities Comm., 304 Ill. 312, 317, 136 N.E. 797. That right is now governed by section 72 of the Public Utilities Act, the pertinent portion of which is as follows:

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount. If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be prima facie evidence of the facts therein stated. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action."

Ill.Rev.Stat.1953, chap. 111 2/3, par. 76.

117 N.E.2d at 775. Thus, it is clear that the Illinois statutes were different from the Oregon statutes. In Illinois, the ratepayer seeks reparations from the PUC and can go to court only to enforce the PUC's reparations order. In Oregon, the OPUC does not have authority to grant reparations. Instead, the ratepayer files suit against the utility for charging unlawful rates, according to ***Dreyer*** and a long line of cases before it illustrating Oregon's scheme, which allows civil remedies in many situations where the OPUC cannot act. Examples of suits against utilities for which the circuit court has jurisdiction include:

- Suits by ratepayers for damages from unlawful utility practices brought under ORS 756.185: ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32,

55, 55 P2d 1133, 1142 (1936); ***Olson v. Pacific Northwest Bell Telephone Co.***, 65 Or App 422, 425, 671 P2d 1185, 1187 (1983)

- Suits by ratepayers for refunds from utility overcharges: ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32, 55, 55 P2d 1133, 1142 (1936)

- Suits by ratepayers against utilities for money had and received: ***Service & Wright Lumber Co. v. Sumpter Valley Ry. Co***., 67 Or 63, 75-76, 135 P 539 (1913); ***McPherson v. Pacific Power & Light Co.***, 207 Or 433, 453, 296 P2d 932, 942 (1956)

- Suits by ratepayers for damages from negligence and breach of contract arising from tariffs filed with the OPUC: ***Holman Transfer Co. v. PNB Telephone Co.,*** 287 Or 387, 401, 599 P2d 1115, 1123 (1979); ***Olson v. Pacific Northwest Bell Telephone Co.***, 65 Or App 422, 425, 671 P2d 1185, 1187 (1983)

- Suits by ratepayers for unlawful trade practices involving misrepresentations concerning OPUC rules: ***Isom v. PGE***, 67 Or App 97, 104, 677 P2d 59 (1983)

- Suits for breach of contract and equitable relief regardless of subsequent tariffs filed with the OPUC: ***Perla Development Co., Inc. v. Pacificorp***, 82 Or App 50, 53-54, 727 P2d 149, 150-151 (1986)

Staff cites ***Alabama v. Alabama Public Service Comm'n***, 293 Ala 553, 73-74, 307 So 2d 521 (1975). There, the Circuit Court decided that a rate order allowing a rate increase of about $1.4 million was excessive in the amount of about $209,000. The court declined to order a refund, because it believed that it could so do only if a supersedeas bond had been filed. The Alabama Supreme Court agreed. Again, ***Dreyer*** has already decided that Oregon law does not preclude damages actions against utilities for having charged unlawful rates, whether or not the rate order authorizing the unlawful charges was stayed. While ***Dreyer*** does not expressly address the stay issue, both PGE and the various amici, including the OPUC itself,

briefed that issue at length.[1] The Court did not accept their position. Curiously, when

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1. When URP did seek a stay from the Circuit Court in the appeal of OPUC Order No. 02-227, both PGE and the OPUC contended that no stay was available! They both argued to the Circuit Court it had no authority to stay the OPUC's rate order. The Circuit Court denied URP the requested stay:

> Because the Plaintiffs now have prevailed on the merits, there is no further need to consider their motion for an interim stay, and that motion is denied as moot.

The reason for "mootness" was that the Circuit Court had concluded that no Oregon law precludes the subsequent granting of relief to ratepayers who have been forced to pay unlawful rates. If the Circuit Court had accepted the OPUC/PGE position on the meaning of ORS 757.225, then it presumably would have granted the stay, as then obtaining that stay would have been the only possible remedy.

If URP had sought a stay in the appeal of OPUC Order No. 95-322 (also before Judge Paul J. Lipscomb) in the Circuit Court in 1995-96, the outcome would presumably have been the same. The Circuit Court had concluded that the rates approved by the OPUC and being charged by PGE were unlawful, in violation of ORS 757.355. If URP there had sought a stay, Judge Lipscomb (or any judge rejecting the "filed rate doctrine" or to whom the "filed rate doctrine" was never presented, as was the case in 1995-96) would likely have denied it as moot, just as he denied it as moot in 2003, because of his conclusion that future relief for the overcharged ratepayers is not precluded by Oregon statutes or any "filed rate doctrine."

Thus, according to Staff now, the only remedy for ratepayers who have paid unlawful rates is to immediately file suit against the OPUC order under ORS 756.580 and immediately seek a discretionary stay. Then the OPUC and the utility will argue to the Circuit Court that it cannot grant a stay, as none is necessary. If the Circuit Court decides against the OPUC and utility on their ORS 757.225 "filed rate doctrine" argument, then the Circuit Court will perceive no reason to grant a stay, because of its belief that relief can be provided to the wronged ratepayers later. Thus, they offer a Catch-22, "heads I win, tails you lose" system:

1. If the utility wins its ORS 757.225 "filed rate doctrine" argument in Circuit Court, then the utility gets to keep all of the unlawful charges, forever.

2. If the utility loses its ORS 757.225 "filed rate doctrine" argument in Circuit Court, then the utility still gets to keep all of the unlawful charges, forever, because rejection of the "filed rate doctrine" necessarily removes the "cause" necessary for granting the stay.

(continued...)

URP did seek a stay of OPUC Order No. 02-227 at the Circuit Court, the OPUC argued that no stay was available in any event.[2]

Staff (p. 17) draws an incorrect conclusion from the Indiana, Ohio, and Illinois cases. Staff claims that those courts "reached a different conclusion--that a judicial order reversing the regulatory agency's rate order did not retroactively make the rates unlawful." Instead, the cases show that the agency does not have authority to order refunds, even if a court overturns an agency decision. This is a much narrower question than whether the court decision makes the rates unlawful. And the question

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1.(...continued)
Since the Circuit Court rejecting the ORS 757.225 "filed rate doctrine" argument will then deny the stay (exactly what occurred in the appeal of OPUC Order No. 02-227), the utility (says Staff) gets to keep the unlawful charges, forever, **whether it wins or loses on any issues on the merits**. In order to obtain the stay, ratepayers themselves must advance and advocate Staff's view of the "filed rate doctrine," which then precludes relief after ratepayers win the appeal. Note that neither Staff nor PGE argued the existence of any filed rate doctrine before Judge Lipscomb in the appeal of OPUC Order No. 95-322. In other words, according to Staff, it does not matter if the courts accept the "filed rate doctrine" argument or not; the utility gets to retain the unlawful charges it has imposed on ratepayers in either event, and judicial review of OPUC rate orders is an utterly meaningless exercise.

2. The COMMISSION RESPONSE TO MOTION FOR STAY OF OPUC ORDER NO. 02-227 stated:

> URP's challenge to Order No. 02-227 is predicated on its assertion that the Commission erroneously concluded the filed rate doctrine precludes the Commission from refunding to customers all amounts customers paid to PGE for return on its undepreciated Trojan investment from the date of OPUC Order No. 95-322 to the date of OPUC Order No. 00-601. Presumably, if URP prevails in this argument, it will have an adequate remedy: refunds. On the other hand, if URP does not prevail, it will be because the court agrees with the Commission that customers were not entitled to a refund of the amounts they paid to PGE for its return on undepreciated Trojan investment under rates set in OPUC Order No. 95-322. In the latter case, URP is not entitled to a remedy. In either case, URP is not harmed.

now before the Commission is the Commission's authority to provide a remedy to ratepayers, not the "lawful" or "unlawful" status of the rates.

Staff (pp. 18-19) then seeks to disagree with the Oregon Supreme Court's opinion in ***Dreyer*** by concluding the possibility that the Legislature was sloppy in drafting ORS 757.225. We prefer to stick with the Oregon Supreme Court's reasoning.

Staff (pp. 20-28) presents a lengthy discussion on the "holistic nature of ratemaking." First, this discussion repeatedly refers to rates being "just and reasonable." Here, the Oregon courts have determined, with finality, that the charges for Trojan return on investment during the 5.5-year period from April 1995 through September 2000 were "unlawful." The law requires not only that rates be "just and reasonable." They must also be "lawful." If not, then ratepayers can file suit for damages against the utility under ORS 756.185.

Staff (pp. 24-25) then misreads the lessons of the cases which Staff contends (p. 26) "express the doctrine of end result" (which is not a doctrine we have heard of). As quoted by Staff, those cases state:

> The economic judgments required in rate proceeding are often hopelessly complex and do not admit of a single correct result.

Duquesne Light Co. v. Barasch, 488 US 299, 314 (1989). But Staff contorts this conclusion into its own opposite. Staff (p. 24) states: "In fact, there are so many there are so many variables in the formula that there are literally an infinite number of ways that an infinite number of regulators could use to arrive at a given result." But

that is not what the cases say. They say there are many possible end results that would be just and reasonable. They do not say that the Commission starts with a "given result" (of unknown source) and then manipulates the variables to reach that "given result." Who gives the "given result"?

Further, the alleged "doctrine of end result" does not authorize a utility to retain funds collected pursuant to rates found by the courts, with finality, to have included unlawful charges. In Oregon, those charges give rise to liability under ORS 756.185 and ORS 756.200, as was ruled in ***Dreyer***. If this alleged doctrine precludes the Commission from ordering the utility to refund money to ratepayers in these circumstances, so be it.

Then the undercurrent surfaces. Staff (pp. 27-28) then zig-zags into another discussion that is beyond the certified question. Staff argues that, even though the Oregon courts have determined, with finality, that the charges for Trojan return on investment were unlawful, those rates might be "just and reasonable" anyway. First, this has nothing to do with the question presented. Second, as noted above, in order to shield the utility from civil liability under ORS 756.185, rates must not only be "just and reasonable." They must also be "lawful." Staff (p. 28) cites the Supplemental Briefing of Plaintiffs-Respondents-Cross-Appellants (March 16, 2007), p. 9, for the proposition that "rates can be illegal, yet still "fair and reasonable."[3] The actual discussion by URP is this:

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3. We have attached that entire brief and hereby incorporate it by reference.

PGE and the OPUC repeatedly offer the argument here that the only thing that matters is whether the rates charged by the utility are "just and reasonable" or "fair and reasonable" as a whole. See PGE Appellant's Brief, pp. 60-62; PGE Reply to Answering Brief, pp. 43-44; OPUC Appellant's Brief (September 9, 2004), pp. 8-9, 16-17, 19. To the contrary, we have argued that the OPUC cannot allow a utility to charge rates that are "unlawful," whether or not they can be characterized as "just and reasonable" or the similar phrase "fair and reasonable."

Dreyer indicates that rates can be "unlawful," thus triggering the availability of remedies for ratepayers, even if they are "fair and reasonable."

> Although a jury theoretically could go about deciding the damage question in the manner suggested, *i.e.,* by determining what a "fair and reasonable" rate would have been if the objectionable return on Trojan had been excluded and then comparing that rate to the one actually charged during the relevant period, it also could simply attempt to determine **what part of the rates that the PUC had approved as "fair and reasonable" in fact represented a return on PGE's investment in Trojan and, therefore, were unlawful** under ORS 757.355 (1993), as interpreted in *Citizens' Utility Board,* 154 Or.App. 702, 962 P.2d 744.

341 Or at 282 (emphasis added). In other words, rates approved by the OPUC as "fair and reasonable" can nevertheless contain charges to ratepayers that are "unlawful." Throughout the opinion, ***Dreyer*** recognized that the charging of unlawful rates gives rise to remedies for ratepayers (civil actions against the utility under ORS 756.185 and perhaps the common law as well).

Staff then argues that "the Commission could have provided PGE the same recovery of Trojan investment without violating ORS 757.355 by allowing PGE a return on the investment." Why this is relevant is a mystery. As noted in the Reply Comments of the CAPs, the OPUC has no authority to engage in idle chat about what it might have done, but did not do, in the past. And, if the Commission is without authority to order refunds to the ratepayers who paid the unlawful charges, then any

proffered conclusions about what the Commission might have done is the past presents no justiciable controversy, as it could not result a concrete transfer of funds from PGE to the ratepayers who paid the unlawful charges.

Finally, Staff (pp. 28-29) contends that the only amounts the Commission could possibly refund would be the lawful charges during the first 8 months that the UE 88 final order, OPUC Order No. 95-322, was in effect. The Court in ***Dreyer*** concluded that the presence of the later rate orders did not nullify the claims of ratepayers for damages under ORS 756.185. 341 Or at 280-81 ("PGE's argument fails on a number of grounds."). The ***Dreyer*** conclusion is that the existence of additional rate orders, after the issuance of OPUC Order No. 95-322 and before the issuance of OPUC Order No. 00-601, did not immunize the Trojan return on investment charges from judicial scrutiny in subsequent civil suits. Whether the existence of later, unappealed rate orders precludes the OPUC from ordering the utility to provide refunds is a different issue.

II. RESPONSES TO CUB OPENING BRIEF.

CUB professes to be surprised in offering an opinion that agrees with PGE. This is the opposite of a surprise, because CUB since August 2000 has subcontracted its position in these cases to PGE. In the SETTLEMENT AGREEMENT BETWEEN CITIZENS' UTILITY BOARD OF OREGON AND PORTLAND GENERAL ELECTRIC COMPANY (August 22, 2000), CUB agreed that it would not disagree with PGE in all

future proceedings on the issue of Trojan profits in rates and particularly the matter of refunds.[4] Thus, CUB should be considered a subcontractor to PGE in this proceeding.

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4. The CUB-PGE Settlement Agreement, which became effective when the OPUC approved the "Stipulation" of some of the parties in UM 989 in September 2000, provides, *inter alia*:

> 2.7 Monies Already Collected.
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> The Parties agree that nothing in this Settlement Agreement shall be interpreted to require, or lead to a result, that PGE refund to customers any of the money it has collected through rates related to its investment in Trojan, prior to and as of the date new rates are established implementing this Settlement Agreement.
>
> 3.2 Parties' Covenants.
>
> Each Party covenants to take all reasonable steps necessary or desirable, and proceed diligently and in good faith and use all reasonable efforts, as promptly as practicable to obtain the Supreme Court's grant of the foregoing motion and ultimately disposition of the disputed matters between the Parties consistent with this Settlement Agreement.
>
> 4.2 Parties' Support to Achieve Commission Approval.
>
> Each Party covenants to take all reasonable steps necessary or desirable, proceed diligently and in good faith and use all reasonable efforts, as promptly as practicable to obtain Commission Approval and ultimately disposition of the disputed matters between the Parties consistent with this Settlement Agreement. In furtherance of this covenant, to the extent permitted each Party agrees to file in any Commission proceeding related to this Settlement Agreement testimony and briefs advocating Commission Approval without conditions adverse to the interests of the other or Staff.
>
> 4.3 Defense of Settlement Agreement and Commission Approval.
>
> Each Party covenants to take all reasonable steps necessary or desirable, and proceed diligently and in good faith and use all reasonable efforts to defend this Settlement Agreement and all orders constituting Commission Approval against any and all challenges thereto by any entity.
>
> 5.1 Proceedings.
>
> Each Party covenants that it will not initiate, prosecute or accept the benefit of any Proceeding in any court if the purpose or effect of the action would be to (a) invalidate this Settlement Agreement or any provisions) thereof or (b) achieve different regulatory treatment for PGE's investment in Trojan than that

(continued...)

CUB (p. 2) entirely misstates the question. According to CUB:

> 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.[5]

But that is not at all the question that the Commission certified to the parties. CUB seeks to change the inquiry from (1) whether the Commission has authority to provide a remedy to ratepayers to (2) whether the Commission can provide to PGE a remedy-blocking service by purporting to "reconstitute the rates going back to the date of issue." That the Commission cannot provide such a remedy-blocking service is addressed in detail in the Reply Comments of the CAPs, filed today.

4.(...continued)
provided for by this Settlement Agreement.

5.2 Refunds.

Provided PGE is not in material breach of this Settlement Agreement, CUB hereby covenants not to seek, and waives any and all rights it may have to seek, or in any way to obtain, refunds of monies previously collected by PGE related to its investment in Trojan.

ARTICLE VI ATTORNEY'S FEES AND COSTS

Upon Commission Approval, PGE shall within five (5) business days pay CUB $227,018.93 representing the reasonable value of attorney's services and other costs directly related to PGE's recovery of, and return on, its investment in Trojan prior to the Effective Date. In addition, PGE further agrees to reimburse CUB for all its reasonable attorney fees incurred in fulfillment of CUB's obligations pursuant to Articles III and IV of this Settlement Agreement.

5. CUB later (p. 3) states that the issue is "the discovery of the authority to order refunds or make retroactive rates" and "the Commission's ability to craft retroactive rates." The making or crafting of retroactive rates is not within the scope of the question presented.

CUB offers various opinions about the ***Dreyer*** decision, many of which are incorrect. The Oregon Supreme Court did not, contrary to CUB's implication (p. 4) say "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." The Court said none of that. Instead, the Court stated that the class action plaintiffs had stated a valid claim under ORS 756.185 for damages stemming from PGE's unlawful charges to ratepayers for return on investment, commencing April 1995.

CUB (p. 4) then engages in a discussion we find incomprehensible about comparing authorized revenues with actual revenues and "having no legitimate authorized rate to compare actual revenues against." We discern nothing relevant there. If CUB is trying to second PGE's argument that OPUC Order No. 95-322 was *void ab initio*, we refer to the argument of the CAPs on that subject.

CUB (p. 6) states about ***Dreyer***:

> 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.

There is no such statement in ***Dreyer***. The Court did not state that rates must be adjusted or a refund offered. Since CUB's premise if false, the remainder of the discussion which follows it (pp. 6-7) should be disregarded. CUB offers a misreading of ***Pacific Northwest Bell Telephone Co. v. Katz****,* 116 OrApp 302, 841 P2d 652, *review denied*, 316 Or 527, 854 P2d 940 (1993) [hereinafter ***PNB v. Katz***], as noted in

the Reply Comments of the CAPs and in the Staff Opening Brief. CUB (p. 8) asserts that ***Dreyer*** "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." Again, ***Dreyer*** contains no such statement and no statement from which even that implication could be extracted. ***Dreyer*** stated that utilities are subject to suits under ORS 756.185, if they charge unlawful rates.

CUB (p. 8) then again appears to be endorsing the PGE *void ab initio* argument. Says CUB:

> 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.

First, ***Dreyer*** did not state that OPUC Order No. 95-322 was "no longer authorized." Second, CUB suggests that there be a refund equal to the difference between "the interim invalidated rates as against the valid authorized rates." What are the "valid authorized rates"? Under ORS 757.225, those would be the rates authorized prior to OPUC Order No. 95-322.

> **ORS 757.225. Utilities required to collect for their services in accordance with schedules.**
>
> 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.

If OPUC Order No. 95-322 did not lawfully change the previous rates, then the UE 48 rates would be the lawful base rates effective until PGE's next general rate case order (OPUC Order No. 01-777 in UE 115) became effective in October 2001. According to OPUC Order No. 95-322, the previous rates were $50.970 million less than authorized in UE 88 for 1995 and $51.812 million less than authorized in UE 88 for 1996 and thereafter. Comparing these lawful rates to those actually charged by PGE during the 5.5-year period would result in a greater PGE liability to the ratepayers who paid the unlawful charges than has been asserted by the class action plaintiffs in ***Dreyer***.

CUB (p. 9) then postulates a conundrum that does not exist. Indeed, it is quite plausible that "the only remedy is one through the civil courts," if the Commission does not actually require PGE to pay all of the unlawful Trojan profits back to the ratepayers who paid the unlawful charges.

III. RESPONSES TO PGE OPENING BRIEF.

The most significant misreading of ***Dreyer*** offered by the PGE Opening Brief is the notion (p. 16) that the Oregon Supreme Court "has therefore left it to the Commission to decide: 1. Whether plaintiffs have been injured." That is not what the Court stated.

First, let's first examine the concluding passage from ***Dreyer*** that PGE does not quote.

> We conclude, in short, that the PUC has primary jurisdiction to determine what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 (1993) between April 1995 and October 2000. If the PUC determines that it can provide a remedy to ratepayers, then the present actions may become moot in whole or in part. If, on the other hand, the PUC determines that it cannot provide a remedy, and that decision becomes final, then the court system may have a role to play. Certainly, after the PUC has made its ruling, plaintiffs will retain the right to return to the circuit court for disposition of whatever issues remain unresolved, including the question of a fee award.

Dreyer, 341 Or at 286. Second, let's examine both of the quoted passages. Neither of them states that the Commission can decide whether the class action plaintiffs have been harmed. Instead, they state that whether the class action plaintiffs have been harmed is a function of what the OPUC does, not what the OPUC says. ***Dreyer*** never states that the Commission is to determine whether plaintiffs have been injured. It states, "Depending on how the PUC responds to that remand, some or all plaintiffs claimed injuries may cease to exist." That is true. If the PUC orders PGE to refund to the plaintiffs all the money that is due to them (return of the unlawful charges plus interest, at the least), then their injuries may cease to exist. What matters is what the OPUC does.

> If that agency 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.

Dreyer, 341 Or at 285. The Court does not state, "If the agency declares that plaintiffs have not been harmed . . ." Nor does the Court state anywhere in ***Dreyer*** that it is the Commission's function to provide a remedy-blocking service for PGE by

declaring "lawful" what the Oregon courts have determined, with finality, to have been unlawful.

PGE's other contentions are answered in the Reply Comments of the CAPs. PGE's brief is the most blatant example of going beyond the certified question. PGE seeks to discuss not what remedy the Commission can determine and provide to ratepayers but what remedy-blocking service the Commission can provide to the utility by means of "retroactive ratemaking." This is beyond the scope of the stipulated question.

PGE apparently recognizes that, if the Commission has no authority to provide refunds or rate reductions, then re-addressing the substance of the rates adopted in OPUC Order No. 95-322 would constitute an advisory opinion, which the Commission does not have authority to entertain. Thus, PGE is compelled to argue, contrary to at least 7 years of its briefing to the Commission and to 3 layers of Oregon courts, that the OPUC does have authority to order refunds in this case. But PGE takes that position, not because it wants to provide a refund, but because it urges the Commission to declare "lawful" what the courts have ruled unlawful and to thereby provide a remedy-blocking service for PGE.

PGE (p. 3) claims that ORS 756.040 authorizes the Commission to do virtually anything "to protect such customers, and the public generally, from unjust and unreasonable exactions and practices." But the charges for Trojan profits during 1995-2000 have been determined to be unlawful, not unjust or unreasonable. Further, both Staff and PacifiCorp argue that the generic grant of power under ORS 756.040

does not provide the Commission with authority to order refunds for rates previously adopted in a final rate order after conduct of the proceedings required by ORS 757.210. The other parties, including the CAPs, have also addressed the ***Pacific Northwest Bell Telephone Co. v. Katz,*** 116 OrApp 302, 841 P2d 652, *review denied*, 316 Or 527, 854 P2d 940 (1993), upon which PGE places heavy reliance.

PGE (p. 6) cites many cases for the proposition that agencies can "provide retroactive relief in certain circumstances." But every case PGE cites pertains to the payment of government benefits, such as welfare. PGE cites no case pertaining to a government agency ordering a private entity to provide retroactive relief.

PGE (pp. 7-8) offers a skewed view of the ***Dreyer*** opinion. The Court indeed decided that the filed rate doctrine and/or ORS 757.225 does not preclude ratepayers from suing utilities for damages under ORS 756.185 for having imposed unlawful charges upon those ratepayers. But the Court specifically noted that it was not opining about the authority of the Commission. ***Dreyer***, 341 Or at 279 n14 and at 286 n19 (issue of "whether the PUC has authority to order refunds or other retroactive relief [] will not be ripe for decision by an appellate court until the PUC acts").

PGE (pp. 12-13) claims that the Commission ordered it to violate a statute. Of course, it was PGE that affirmatively and aggressively procured the OPUC decisions it now decries. The Court in ***Dreyer*** actually recognized that PGE's alleged dilemma was self-imposed. 341 Or at 279 n15:

> However, realistically, utilities will rarely if ever be placed involuntarily into such a position; rather, they will make a calculated decision to pursue a

theory that may or may not withstand judicial review (as in the present case), with the consequences of such a ruling factored into the choice to press their theory in the first place.

PGE's *void ab initio* argument (pp. 13-14) is answered both in the Reply Comments of the CAPs and above in our reply to the CUB comments. If OPUC Order No. 95-322 is *void ab initio*, then the lawful base rates for the 5.5-year period are the UE 48 rates, which were about $60 million per year less than the UE 88 rates adopted in OPUC Order No. 95-322. If PGE indeed believes that the UE 88 rates are *void ab initio*, then it should not object in ***Dreyer*** to the class action plaintiffs there seeking to recover all of those amounts in the form of damages under ORS 756.185. This will serve to increase the magnitude of the amounts to be sought by the class action plaintiffs in ***Dreyer***.

IV. RESPONSES TO PP&L OPENING BRIEF.

The PacifiCorp Opening Brief treats this exercise as if it were a rulemaking, with comments about how to handle various situations in the future. This is not a rulemaking, and the certified questions pertains solely to a remedy for PGE ratepayers who paid the unlawful charges during 1995-2000. PacifiCorp offers various pronouncements about the authority of a court "to order the Commission to determine a rate refund or surcharge" (pp. 2, 6), but that is not relevant to the current inquiry, because no court with jurisdiction over the amounts "collected in violation of ORS 757.355 between April 1995 and October 2000" has issued such a order.

PacifiCorp (p. 4) proceeds beyond the scope of the question presented by discussing whether civil damages claims against utilities are improper collateral attacks on Commission rate orders. In the instant case, ***Dreyer*** has determined that ratepayer claims against PGE due it its unlawful charges for Trojan return on investment during the 5.5-year period April 1995 - October 2000 is not an improper collateral attack. And the cases cited by PacifiCorp do not establish that proposition in any event.[6]

PacifiCorp (p. 4) then quotes ***Dreyer*** for propositions it did not accept. The quotes about the filed rate doctrine in ***Dreyer*** were mere statements about what is asserted about the filed rate doctrine, not statements that the Court accepted or propounded itself. Then, PacifiCorp (p. 5) claims that ***Dreyer*** "suggests a modified formulation of the filed rate doctrine in Oregon," but again PacifiCorp improperly quotes a passage from ***Dreyer*** that the Court did not adopt.

> After the period for judicial review is concluded, the rate order is final, conclusively lawful and may serve 'as a shield against a claim of unlawfulness.' ***Dreyer***, 341 OR at 278.

The Court in ***Dreyer*** did not adopt the quoted conclusion.

The Commission may safely disregard the discussion offered by PacifiCorp (pp. 6-7) about the authority of courts to order refunds or surcharges. PacifiCorp examines the wrong statutes. The appeal of OPUC Order No. 95-322 was not and is not

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6. For a discussion of the ***Portland Traction*** cases, see the short excerpt of the Surreply Brief of Plaintiffs-Adverse Parties (September 6, 2005) in ***Dreyer***, which is appended to PGE's Opening Brief filed June 20, 2007.

governed by ORS 183.486. It is governed by ORS 756.580 et seq., the law applicable to appeals of OPUC orders prior to its amendment by the Oregon Legislature in 2005. Further, the various cases PacifiCorp cites are irrelevant, as they involve monetary "ancillary relief" against the agency defendant, not against the entity regulated by the agency. Is PacifiCorp suggesting that the OPUC pay the refunds out of its own pocket or out of the Treasury of the State of Oregon?

PacifiCorp (pp. 7-9) then offers a proposal that a court can order refunds or surcharges, provided that there is "advance notice that a reversal of the rate order could lead to a refund or surcharge." In the instant case, hoover, there was no such notice, so the suggestion appears immaterial to the certified question.

PacifiCorp (p. 10) contends that, if the utility consents to a refund or to a surcharge, then the Commission has authority to implement it. No doubt a utility would consent to a surcharge, and the notion that such consent would render it within the Commission's authority is absurd. Of course, a utility could "consent" to a refund, merely by cutting checks to ratepayers. But that does not enlarge the authority of the Commission.

PacifiCorp (pp. 11-12) repeatedly misquotes ***Dreyer*** as stating that "ratemaking is exclusively within the Commission's jurisdiction." There is no such statement in ***Dreyer***. Again, PacifiCorp is quoting from a passage in ***Dreyer*** where the Court is merely restating the argument of PGE, not adopting it. "PGE argues . . . matters of utility regulation . . . are the exclusive province of the PUC." PacifiCorp (p. 11) then

directly contradicts ***Dreyer*** by claiming that "the implementation of a rate refund or surcharge requires the Commission to engage in ratemaking." The Court in ***Dreyer*** stated the opposite.

> But PGE then moves on to a more debatable proposition, namely, that any resolution of the present action necessarily will involve ratemaking. PGE contends that that is so because "the jury will have to decide what rates the PUC would or should have set if it had not made an error in [PUC] Order [No.] 95-322."
>
> We disagree.

Dreyer, 341 Or at 282.

PacifiCorp also repeatedly quotes from the Commission's scoping order in these remand dockets, OPUC Order No. 04-597. The Commission later repudiated that order, in its decision calling for these memoranda.[7] So quoting the very order that is being reexamined here is hardly persuasive.

PacifiCorp (p. 12) then again misquotes ***Dreyer*** for the proposition that the claims in ***Dreyer*** "at least indirectly implicated ratemaking." Again, there is no such statement in ***Dreyer***, which instead concluded:

> Thus, we do not accept PGE's argument that the circuit court is without jurisdiction to hear plaintiffs' claims because they necessary involve ratemaking or pertain to utility regulation.

341 Or at 282.

PacifiCorp (p. 12) then adopts the same falsehood about ***Dreyer*** that is forwarded by PGE: That it assigned to the Commission the primary jurisdiction to

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7. "[W]e find that we prematurely undertook the first phase of these joint remand proceedings." OPUC Order No. 07-157, p. 9.

determine "whether plaintiffs have been injured (and, if they have been, the extent of the injury)." See our response to this misconstruction of ***Dreyer***, above. ***Dreyer*** does not state that the Commission can decide whether the class action plaintiffs have been injured. Instead, it states that whether the class action plaintiffs have been injured (when the class action suit resumes) is a function of what the OPUC does, not what the OPUC says.

Dated: July 20, 2007

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by email to the Filing Center and by mail, postmarked this date, and that I served a true copy of the foregoing OPENING COMMENTS OF UTILITY REFORM PROJECT, ET AL. ON THE PROFFERED QUESTION REGARDING REMEDIES by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

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Dated: July 20, 2007

_____
Daniel W. Meek

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

UTILITY REFORM PROJECT, LLOYD K. MARBET, and LINDA K. WILLIAMS,

Plaintiffs-Respondents, Cross-Appellants,

v.

OREGON PUBLIC UTILITY COMMISSION,

Defendant-Appellant, Cross-Respondent,

PORTLAND GENERAL ELECTRIC CO.,

Intervenor-Appellant, Cross-Respondent.

No. CA A123750

Marion County Circuit Court No. 02C-14884

Appeal from Judgment of The Circuit Court of Oregon for the County of Marion Honorable PAUL J. LIPSCOMB, Presiding Judge

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First, we respectfully disagree with the statement in the Court's letter of February 16, 2006, that:

> "The issues regarding the commission's authority regarding retroactive rulemaking do appear to be premature at this time."

Initially, we assume that the Court meant to refer to "retroactive ratemaking," as that is the issue at hand. Further, the issue of the Commission's authority regarding "retroactive ratemaking" is actually central to the Court's review of OPUC Order No. 02-227, because the assertion by PGE and the OPUC Staff that the OPUC lacks such authority formed the basis for that OPUC order.

Second, we offer our views on the effect on the instant case of the decision of the Oregon Supreme Court in ***Dreyer, et al. v. Portland General Electric Co.***, 341 Or 262, 142 P3d 1010 (2006) [hereinafter ***Dreyer***].

I. EFFECTS OF *DREYER* ON THE INSTANT CASE: OVERVIEW.

While the Oregon Supreme Court in ***Dreyer*** rejected many arguments by PGE that appear to be identical to arguments presented by PGE in the instant case, the ***Dreyer*** opinion addressed the validity of PGE's arguments in a different situation and as applicable to a different remedy for ratepayers who have been charged unlawful rates.

Dreyer addressed the various PGE arguments that ratepayers can never get back from the utility any money already collected, even under rates determined to have been unlawful. The Supreme Court concluded that those arguments do not preclude ratepayers from bringing successful actions against the utility under ORS 756.185 to recover from the utility the damages to ratepayers resulting from the imposition of unlawful rates. In the instant case,

however, that question is not presented. Instead, the question is whether the various similar PGE (and OPUC) arguments preclude the OPUC from any or all of the following actions:

Action 1. Take past unlawful charges into account when setting future rates.

Action 2. Order the utility to pay money back to ratepayers who have paid unlawful rates, either in the form of checks or immediate reductions to current utility bills.

The associated questions are whether, if the OPUC has authority to undertake "Action 1" and/or "Action 2" above, is the OPUC required by law to do so in the instant circumstances.

A. ACTION 1: CAN OR MUST THE OPUC TAKE PAST UNLAWFUL CHARGES INTO ACCOUNT WHEN SETTING FUTURE RATES?

The availability of "Action 1" is at issue in the instant case. The OPUC's refusal to take past unlawful charges into account when setting the rates in OPUC Order No. 02-227 formed the primary basis for the Circuit Court's decision that those rates are unjust, unreasonable, and unlawful.

PGE and the OPUC contend that each rate case is like a hermetically sealed biosphere, and the consequences of one case cannot bleed into other cases. The usual application of this principal is to issues addressed on a single test year basis in general rate cases; that is, a cost is estimated for a test year, and the utility is allowed to include that cost into rates on an annual basis.

The instant case presents a somewhat different situation. The charges to ratepayers for the capital cost of Trojan were handled (in a general rate case) in a multi-year side calculation

established in OPUC Order No. 95-322.[1] Under that side calculation, ratepayers were charged for Trojan capital costs in their monthly bills, and those charges were applied against the balance of the Trojan account. But, the Trojan capital account was allowed to earn a return on investment (at the utility's authorized rate of return on ratebase) during the entire period. The charges paid by ratepayers were applied partly against the Trojan capital account balance but partly went to pay PGE stockholders for a return on investment for Trojan. In effect, as charges to ratepayers reduced the Trojan capital account balance, the balance was increased by the accrual of return on investment.

Below, the Circuit Court concluded that ***CUB/URP v. OPUC*** required that the Trojan account not accrue the return on investment.[2] Thus, under the reasoning of the Circuit Court, every payment by ratepayers for Trojan capital costs should have been subtracted from the principal balance of the account. This would have left the principal balance, as of October 1, 2000, at a level of zero or less instead of $180.5 million. See Brief of Plaintiffs-Respondents-Cross-Appellants (September 27, 2005), pp. 10, 35-36. The Circuit Court thus concluded that the rates in OPUC Order No. 02-227 had no legitimate basis, because the various accounting and other machinations approved by the OPUC in that order flowed from the invalid premise that ratepayers still owed PGE $180.5 for Trojan capital costs as of October 1, 2000.

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1. ***Dreyer*** recognized that the side calculation for Trojan capital costs was not linked to later rate cases until the UM 989 docket that produced OPUC Order No. 02-227, the order under review here. 341 Or at 281.

2. ***CUB/URP v. OPUC*** refers to ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (2002).

Thus, whether the OPUC has legal **authority** to take Action 1 is an issue in the instant case. The OPUC in Order No. 02-227 claimed it no authority to take Action 1. The Circuit Court's decision necessarily concludes that the OPUC has authority to take Action 1.

This case presents the related issue: Whether the OPUC is **required** to take Action 1 in the instant case. The Circuit Court ruled that, in these circumstances, the OPUC was required to take Action 1. If this Court concludes that the authority to take Action 1 exists and remands this case, the OPUC might still **choose** not to take Action 1. Ratepayers would then be required to appeal that decision, and so on. Here, the Circuit Court decision places before this Court the issue of whether the OPUC is **required** to take Action 1 in these circumstances, as that was the Circuit Court's conclusion.

In the Brief of Plaintiffs-Respondents-Cross-Appellants (September 27, 2005), p. 35, we argued:

> URP's argument on the merits here was that OPUC should have recharacterized the all of the $59 million per year charged to ratepayers for the Trojan investment (return of and return on) during the previous 5.5-year period as return of investment. Doing so would completely eliminate the alleged $180.5 million Trojan investment "balance" as of October 1, 2000, asserted by PGE and OPUC. As noted earlier [pp. 6, 10-11], URP now believes that the better view of the law is that the OPUC cannot retroactively recharacterize past charges, and that the proper remedy for past unlawful charges is ratepayer suit under ORS 756.185 and ORS 756.200.

Dreyer has now confirmed the availability of the remedies under ORS 756.185 and ORS 756.200. As noted in the Reply Brief of Plaintiffs-Respondents-Cross-Appellants (September 5, 2006), "Thus, the relevant discussion in the URP brief regarding URP's position in this case is presented at page 9 [of the Brief of Plaintiffs-Respondents-Cross-Appellants (September 27, 2005)] under the heading: "b. If the Oregon Supreme Court agrees with the

Class Action Plaintiffs and not PGE." In light of ***Dreyer***, we agreed with PGE and OPUC that the rate period is sealed and not subject to retroactive change by the OPUC. Thus, Action 1 is not available to the OPUC.[3] But, as recognized in ***Dreyer***, if rates in any past period are determined to be unlawful, then ratepayers have remedies against the utility pursuant to ORS 756.185 and perhaps also the common law.[4]

B. ACTION 2: CAN THE OPUC ORDER THE UTILITY TO PAY MONEY BACK TO RATEPAYERS WHO HAVE PAID UNLAWFUL RATES, EITHER IN THE FORM OF CHECKS OR IMMEDIATE REDUCTIONS TO CURRENT UTILITY BILLS?

In the instant case, whether or not the OPUC can take Action 2 may be considered "premature" but it is ripe. Yes, if the Court of Appeals upholds the legal conclusion of the Circuit Court that the rates set by OPUC Order No. 02-227 are unlawful, it can remand the matter to the OPUC for resolution and the addressing of Action 2 above. Assuming that the OPUC then decides against Action 2 due to self-asserted lack of authority to take Action 2, then ratepayers would have to appeal that decision, and on and on. Instead, the Court of Appeals could decide whether Action 2 is available to the OPUC, as the issue has been presented and briefed in this case. Both PGE and OPUC have taken the position that Action 2 is not available to the OPUC. As noted in the Reply Brief of Plaintiffs-Respondents-Cross-Appellants (September 5, 2006), p. 9, Plaintiffs-Respondents have no position on this issue.

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3. The Reply Brief of Plaintiffs-Respondents-Cross-Appellants, p. 8, contains the incorrect statement that "the Circuit Court was within its authority to draw this conclusion" that past unlawful charges should be accounted for in a subsequent OPUC case.

4. ***Dreyer*** did not address the arguments about the availability of common law remedies against the utility, in addition to the remedies under ORS 756.185, as it was not necessary to the outcome of the case.

II. *DREYER* SIMPLIFIES THIS CASE.

As noted in the Reply Brief of Plaintiffs-Respondents-Cross-Appellants (September 5, 2006), p. 3, ***Dreyer*** simplifies this case.

> The legal conclusion in ***Dreyer*** (that ratepayer suits are available under ORS 756.185 against utilities for damages resulting from the imposition of rates later found unlawful by the courts) simplifies the position of URP in this appeal, previously stated in the Brief of Plaintiffs-Respondents-Cross-Appellants, pp. 4-14 [hereinafter URP Brief]. We now know that neither ORS 757.225 (nor PGE's theory that requires ratepayers to appeal dozens of OPUC orders just to challenge a single one) precludes ratepayer judicial remedies against utilities pursuant to ORS 756.185. Instead, the roadmap outlined in ***Dreyer*** is the same as we urged in the URP Brief, p. 6. The Oregon Supreme Court has now agreed with the Class Action Plaintiffs (CAPs) in ***Dreyer*** that, as we stated in the URP Brief, p. 6:
>
> > **1. Ratepayers do have a remedy for the past unlawful charges, which is suit against the utility pursuant to ORS 756.185 and ORS 756.200.**
>
> Thus, the relevant discussion in the URP brief regarding URP's position in this case is presented at page 9 under the heading: "**b. If the Oregon Supreme Court agrees with the Class Action Plaintiffs and not PGE.**"

In addition, while ***Dreyer*** is not *res judicata* to this case and does not necessarily resolve the validity of the contentions of PGE and the OPUC in this particular context, it does offer some guidance on the legal issues.

III. *DREYER* INDICATES THE CONTINUING VITALITY OF THE COURT DECISIONS IN *CUB/URP V. OPUC*.

The PGE Appellant's Brief (September 27, 2004), pp. 6, 22-27, argues at length for reversal of ***CUB/URP v. OPUC***, as does the PGE Reply to Answering Brief (May 2, 2006), pp. 9-14. In addition to the reasons for not reversing ***CUB/URP v. OPUC*** previously offered (see Brief of Plaintiffs-Respondents-Cross-Appellants, pp. 31-34), ***Dreyer*** indicates the continuing vitality of the ***CUB/URP v. OPUC*** decision. The ***Dreyer*** opinion discussed

CUB/URP v. OPUC extensively, with no hint that it should be reconsidered or is in any way subject to question. 341 Or at 269-70.

IV. *DREYER* REJECTED APPLICATION OF THE "FILED RATE DOCTRINE" TO RATEPAYER REMEDIES AVAILABLE UNDER ORS 756.185.

In ***Dreyer*** and in the instant case, both PGE and the OPUC have claimed that ORS 757.225 establishes what the Oregon Supreme Court termed "the extreme form of the 'filed rate doctrine' that PGE (and, apparently, the PUC) advocate." 341 Or at 278. In ***Dreyer***, the Supreme Court rejected their contention that ORS 757.225 establishes a "filed rate doctrine" that precludes ratepayers from using their ORS 756.185 remedy after being charged rates determined to have been unlawful. See ***Dreyer***, 341 Or at 277-80.

In the instant case, one question is whether the "filed rate doctrine" asserted by PGE and the OPUC precludes the OPUC from taking either or both of Action 1 and/or Action 2 described at pages 2-5, *supra*. While ***Dreyer*** addressed the effect of the "filed rate doctrine" on the ratepayer remedy of direct court action against the offending utility under ORS 756.185, the issue presented in the instant case is the effect of the "filed rate doctrine" on the authority of the OPUC to grant refunds for unlawful charges paid by ratepayers in past rate periods. These are quite different questions.

In addition, ***Dreyer*** did not foreclose the application of the "filed rate doctrine" to limit the authority and actions of the OPUC.

> 14. Although we reject PGE's contention here that ORS 757.225 embodies the particular application of the filed-rate doctrine that it espouses, we do not reject the possibility that Oregon utility law incorporates some form of the doctrine. We simply do not address that question here.

In the instant case, PGE's "filed rate doctrine" arguments are presented in the PGE Appellant's Brief, pp. 28-62; PGE Reply to Answering Brief, pp. 14-36. In the PGE Appellant's Brief, the argument depends largely but not exclusively upon ORS 757.225, as did PGE's arguments in ***Dreyer***.

In the instance case, the OPUC's "filed rate doctrine" arguments are presented in the OPUC Appellant's Brief (September 9, 2004), pp. 10, 15-22; PUC's Combined Reply/Cross-Answering Brief (March 30, 2006), pp. 7-16, 22, 26. All of these sections appear to be depend upon ORS 757.225. But, as noted, above, the "filed rate doctrine" issue in the instant case is different from the "filed rate doctrine" issue in ***Dreyer***.

V. *DREYER* REJECTS THE ARGUMENT THAT RATEPAYER CLAIMS AGAINST THE UTILITY UNDER ORS 756.185 ARE PRECLUDED DUE TO INTERVENING, UNAPPEALED OPUC RATE ORDERS.

Both in ***Dreyer*** and here, PGE has argued that ratepayers have no valid claims pertaining to amounts charged for Trojan after November 28, 1995, because of the existence of additional rate cases and rate orders that no party appealed from. See PGE Appellant's Brief, pp. 53-54; PGE Reply to Answering Brief, pp. 42-43.

Dreyer rejected this argument, as applied to civil suits. See 341 Or at 280-81 ("PGE's argument fails on a number of grounds."). The ***Dreyer*** conclusion is that the existence of additional rate cases, after the issuance of OPUC Order No. 95-322 and before the issuance of OPUC Order No. 00-601, did not immunize the Trojan return <u>on</u> investment charges from judicial scrutiny in a subsequent civil suit. Whether the existence of later, unappealed rate

orders precludes the OPUC from reopening and changing the first decision is a somewhat different issue.

VI. *DREYER* INDICATES THAT A SET OF RATES CAN BE BOTH "JUST AND REASONABLE" AND BE UNLAWFUL.

PGE and the OPUC repeatedly offer the argument here that the only thing that matters is whether the rates charged by the utility are "just and reasonable" or "fair and reasonable" as a whole. See PGE Appellant's Brief, pp. 60-62; PGE Reply to Answering Brief, pp. 43-44; OPUC Appellant's Brief (September 9, 2004), pp. 8-9, 16-17, 19. To the contrary, we have argued that the OPUC cannot allow a utility to charge rates that are "unlawful," whether or not they can be characterized as "just and reasonable" or the similar phrase "fair and reasonable."

Dreyer indicates that rates can be "unlawful," thus triggering the availability of remedies for ratepayers, even if they are "fair and reasonable."

> Although a jury theoretically could go about deciding the damage question in the manner suggested, *i.e.,* by determining what a "fair and reasonable" rate would have been if the objectionable return on Trojan had been excluded and then comparing that rate to the one actually charged during the relevant period, it also could simply attempt to determine **what part of the rates that the PUC had approved as "fair and reasonable" in fact represented a return on PGE's investment in Trojan and, therefore, were unlawful** under ORS 757.355 (1993), as interpreted in *Citizens' Utility Board,* 154 Or.App. 702, 962 P.2d 744.

341 Or at 282 (emphasis added). In other words, rates approved by the OPUC as "fair and reasonable" can nevertheless contain charges to ratepayers that are "unlawful." Throughout the opinion, ***Dreyer*** recognized that the charging of unlawful rates gives rise to remedies for

ratepayers (civil actions against the utility under ORS 756.185 and perhaps the common law as well).

VII. CONCLUSION.

The Oregon Supreme Court in ***Dreyer*** heard and resolved arguments that appear to be similar to those in the instant appeal. But each such argument must be analyzed in its context. The bulk of the briefing offered in the instant appeal by PGE and the OPUC addresses the "filed rate doctrine" in the form of ORS 757.225 or in the form of precedents that do not rely on that statute. While it may be tempting to say that ***Dreyer*** has destroyed the "filed rate doctrine" in Oregon, that would be an overstatement. ***Dreyer*** held that the "filed rate doctrine" asserted to reside in ORS 757.225 does not nullify or preclude the remedy for unlawful charges available to ratepayers under ORS 756.185. ***Dreyer*** did not hold or opine upon the effect of the asserted "filed rate doctrine" on the authority of the OPUC to either:

Action 1. Take past unlawful charges into account when setting future rates.

Action 2. Order the utility to pay money back to ratepayers who have paid unlawful rates, either in the form of checks or immediate reductions to current utility bills.

Our review of the briefing indicates that no party in this appeal asserts that the OPUC has authority to take either Action 1 or Action 2. ***Dreyer*** is not contrary to that conclusion but instead held that ratepayers who have paid unlawful rates have a direct damages action

against the offending utility under ORS 756.185.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SUPPLEMENTAL BRIEFING OF PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS by mailing 2 copies sealed in an envelope with first class postage prepaid, addressed to each of the parties listed below.

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