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 THE CLASS ACTION PLAINTIFFS (GEARHART, KAFOURY, MORGAN) ON THE PROFFERED QUESTION REGARDING REMEDIES

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I. THE *DREYER* DECISION IS ENTIRELY CONSISTENT WITH 100 YEARS OF STATUTORY CONSTRUCTION.

Dreyer v. Portland General Electric Company, 341 Or 262 (2006) ("***Dreyer***"), hardly turns utility regulation on its head. At issue in ***Dreyer*** was whether the Class Action Plaintiffs ("CAPs") stated civil claims under common law theories and ORS 757.185 for charges in violation of ORS 757.355. The case arrived at the Supreme Court by writs of mandamus which inquired whether the trial court's certification of the ratepayer class and grants of partial summary judgment on liability in favor of the Class Representatives should be reversed. The extraordinary harm alleged by PGE in seeking the writs was what would be the next step in the trial court process: class action notice.

The Supreme Court held that the CAPs did state claims, notwithstanding the argument raised by PGE that ORS 757.225 was an absolute shield from all suits. The decision merely holds that the most extreme form of "the filed rate doctrine" advocated by PGE to the Court in that case is not available in Oregon as a defense by a utility to civil suits by ratepayers for recovery of unlawful charges. The rights are expressly preserved in ORS 757.200. This has been black letter law for years.

Thus, ***Dreyer*** stands for the entirely unremarkable proposition that ORS 757.225 does not preclude the CAPs from bringing suit under ORS 757.185 and 757.355 for damages based on the portion of rates which represented unlawful charges for Trojan return <u>on</u> investment (profit). It also stands for the proposition that, of the three strands of the filed rate doctrine, Oregon rejects the limit-on-civil-suits strand of the filed rate doctrine (discussed at CAPs Opening Comments, pp. 43-47) and does embody the duty-on-the-utility strand (discussed at CAPs Opening Comments, pp. 35-37). A utility's adherence to those filed rates does not,

however, make the charges "conclusively lawful for all purposes." Particularly, requiring the utility to charge only the rates on file does not "conclusively and permanently bind[] the entire world to the rate decisions of the PUC." 341 Or at 279.

> Based on the foregoing, we therefore agree with plaintiffs that ORS 757.225 is most reasonably read as a direction to utilities to charge all their ratepayers the PUC-approved rate and, if a utility is dissatisfied with a rate, to obtain a new PUC-approved rate through the process set out at ORS 757.210 to 757.220. The statute is not aimed, as PGE suggests, at conclusively and permanently binding the entire world to the rate decisions of the PUC. [FN14]
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> 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.

341 Or at 279.

Dreyer is hardly a "revelation," as CUB (Opening Brief, p. 1) suggests, but is a reiteration of ratepayers' rights to sue utilities in ***Dreyer***-type circumstances. These ratepayer remedies have been known and exercised for a century.[1] None of this is a departure from

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1. ***Isom v. Portland General Elec. Co.***, 67 OrApp 97, 104, 677 P2d 59, 64 (1984), held that ORS 756.200 means what it clearly states. Plaintiffs had sued PGE for abusive debt collection practices in threatening utility shut-off.

> [P]laintiffs argue that their causes of action under the Unlawful Debt Collection Practices Act, ORS 646.639 *et seq,* should not have been dismissed for failure to exhaust administrative remedies, because the Commissioner has no power to enforce the act. We agree. The legislature, through the Unlawful Debt Collection Practices Act, has provided a private right of action for certain debt collection practices not subject to the commissioner's authority. Plaintiffs are entitled to pursue this cause of action. *See* ORS 756.200(1).[FN9]
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> FN9. ORS 756.200(1) provides:
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> "The remedies and enforcement procedures provided in ORS chapters 756, 757, 758, 760, 761, 763, 764, 767 and 773 do not release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may arise under any law of this state or under an ordinance of any municipality thereof."

existing Oregon law, and no *dicta* in ***Dreyer*** recites anything about the powers of the OPUC. The decision leaves for another day to what extent the "filed rate doctrine" applies to the powers of the OPUC. The Court, however, concluded that it would be more efficient to allow the agency to shape the issues before it, including its application of the rule against retroactive ratemaking. The Court restated the OPUC's position.

> The "filed rate doctrine" holds, generally, that any rate filed with and approved by the relevant ratemaking agency represents a contract between the utility and the customer and is conclusively lawful until a new rate is approved. The corollary "rule against retroactivity" holds that approved utility rates may be modified only prospectively and that utilities cannot provide retrospective relief from such rates. No Oregon court has expressly decided whether Oregon accepts the filed-rate doctrine or the corollary rule against retroactive ratemaking.No Oregon court has expressly decided whether Oregon accepts the filed-rate doctrine or the corollary rule against retroactive ratemaking. However, the PUC long has argued that the two doctrines apply and the Oregon Attorney General has concurred in that position. Letter of Advice dated March 18, 1987, to Charles Davis, Public Utility Commissioner (Op-6076). Both the PUC and the Attorney General suggest that there are strong policy considerations underpinning the two doctrines. The PUC also contends that the doctrines inhere in an Oregon statute, ORS 757.225.
>
> * * *.
>
> In its briefs to this court, PGE asserts that ***McPherson et al v. Pacific P. & L. Co.,*** 207 Or 433, 296 P2d 932 (1956), implicitly adopts the filed-rate doctrine, but the validity of that assertion is debatable. Certainly, ***McPherson*** does not adopt any rule about retroactive ratemaking. [O]ur disposition of this case eliminates any need to address the issue in this opinion.

Dreyer, 341 Or at 271 n10.

McPherson does not support PGE's asserted version of the "filed rate doctrine," which would preclude civil suits, because its holding was aimed at the statutory limitations upon Commission power, not limitations on the plenary power of the courts to hear civil suits:

> Turning to the statutes dealing with utilities * * * we find that the Commissioner has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges * * *.
>
> * * *
>
> The railroad statutes confer jurisdiction upon the Commissioner to award reparation. No such provision is found in the public utility statutes.

McPherson v. Pacific Power & Light Co., 207 Or at 452. ***McPherson*** remains relevant to the question what remedial power OPUC may have. The Supreme Court imposed a strict construction on the PUC's authority:

> The commissioner's jurisdiction is limited. His authority must affirmatively appear from the law creating his office and defining his powers.

207 Or at 449.

II. *PNB v. KATZ* DECISION.

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***], recites one traditional definition of retroactive ratemaking:

> 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.

Katz, 166 Or App at 311 (emphasis in original). In ***Katz***, the refunds of temporary rates charged in violation of the commission-determined revenue requirement were not retroactive because there was no "redetermination" after facts had been settled. Refunds of such temporary and unauthorized rates does not involve looking at profits or shortfalls incurred by the utility before the effective date of the conditional rates.

In Phase I of this remand proceeding, the Commission *is* purporting to redetermine settled facts, creating and considering a new record, and comparing the authorized revenues during 1995-2000 with an adjustment for the "unexpected shortfall" caused by the inclusion of illegal profits on Trojan in those rates. Phase I is retroactive ratemaking within the meaning of ***Katz***.

III. BACK-DATING ORDERS TO AVOID THE RULE AGAINST RETROACTIVE RATEMAKING IS NOT AUTHORIZED.

The commentators who wish to somehow forestall the civil litigation remedies available to the CAPs rely upon recitation of extraordinary circumstances and a grab-bag of legal concepts which do not apply in Oregon law. PacifiCorp, joined by Idaho Power, wish to inaugurate an entirely new "notice and consent" procedure. This is not a rule-making and these sweeping policy revisions should not be considered in this context.

A. THE COMMISSION CANNOT ENTER AN ORDER NUNC PRO TUNC ON A CLOSED EVIDENTIARY RECORD.

CUB asks (Opening Brief, p. 2), "can the Commission reconstitute the rates going back to the date of issue to fix the element that was found to be invalid * * *?" "Reconstitute" is an alien concept in ratemaking. The Commission can not just "add some facts" and stir in some new reasoning to come up with rates that have any effect, nor can it back-date an order.

The Commission cannot avoid the prohibition on retroactive ratemaking by the pretense of entering a back-dated order under some analogy to a judicial order *nunc pro tunc*. The judicial power to correct an order *nunc pro tunc* is limited to correcting a judicial clerical error which should have been stated correctly at the time. The power cannot be used as a

"means of patching up a defective record by injecting therein something that did not occur." ***Frederick & Nelson v. Bard***, 66 Or 259, 262, 134 P 318 (1913).

> The function of a *nunc pro tunc* entry is to make a record of what was previously done, but not then entered; not to make an order now for then, but to enter now for then an order previously made. The purpose of a *nunc pro tunc* order is to supply an omission in the record of action actually taken but omitted from the record through inadvertence or mistake, or to enter an order which should have been made as a matter of course and as a legal duty. * * * Such an order is effective only when it records a previously omitted truth--it does not create, but only speaks what has been done.

Gillespie v. Kononen, 310 Or 272, 276 n7, 797 P2d 361 (1990) (citations omitted). An entry *nunc pro tunc* is "a manifestation of the inherent power of a court to make its record speak the truth, that is, to correct clerical errors at a later time so that the record reflects what actually occurred at an earlier time." ***State ex rel Juv. Dept. v. Dreyer***, 328 Or 332, 339, 976 P2d 1123 (1999).

B. THE CONCEPT OF "VOID AB INITIO" APPLIES TO THE RIGHTS OF PARTIES SUBJECT TO AN ILLEGAL ORDER AND DOES NOT CONFER POWER ON THE COMMISSION TO ADJUDICATE THE RIGHTS OF THE PARTIES.

Dreyer holds that the CAPs have rights to sue for rate overcharges after certain charges have been found unlawful after judicial review. No court has found the rate order "void ab initio," only that the CAPs have stated a claim for damages in civil suits for the amount of the illegal charges and the fact that those charges were included in the rates-on-file is not a defense once the charges have been found unlawful with finality.

The concept of "void *ab initio*" means that the prior act never had substantive legal effect. It is thus distinct from any power to correct *nunc pro tunc*, which can used correct

clerical errors to accurately state what was done in the past. A void action has no valid substance to "correct." In general, a legal conclusion of "void ab initio" means that an order, has never taken effect and the law or contract or order is voidable when challenged. In itself a conclusion that an act was of void *ab initio* does not vacate or enjoin the earlier act. The consequence of a holding that some act was void *ab initio* is that it allows a proper party to challenge conduct undertaken under color of the law, ordinance, judgment or contract which was void *ab initio* and seek remedies.[2] That is exactly what the CAPs have done.[3] The concept does not grant power to the court or the commission to do anything retroactively, but merely states what the legal status has been so those affected parties can assert rights.

For example, a state court proceeding undertaken in violation of the automatic stay in bankruptcy is void *ab initio*. Thus a foreclosure sale or any other judgment against the debtor after the stay attaches is void *ab initio*. Such a void act cannot be cured by issuing a back-dated document *nunc pro tunc* to an earlier date to avoid the date of the stay. Nor can a void

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2. In Oregon (and under the federal constitution), a successfully challenged legislative act is void *ab initio*.

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

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

3. PGE is keeping money from charges that were unlawfully imposed and conditionally collected. The charges for Trojan profit ("return on investment") were void *ab initio*. Thus, the only lawful rates after the charges were illegally introduced by PUC order No. 95-322 are those charges properly based on permissible costs of service and other standards. While PGE may have had a conditional right to bill and collect the money for unlawful charges, it has no legal right or equitable claim to keep the money now or to keep the time value of that money since the time it was taken from ratepayers.

ab initio judgment be revived by reissuing it after the stay is lifted, as "there was nothing" to confirm *nunc pro tunc*.

In ***Matter of Cappadonna***, 154 BR 639, 641 (NJ Bnk 1993), the sole legal issue was whether a judgment of foreclosure obtained on April 9, 1992 during the pendency of the stay and reentered September 16, 1992 *nunc pro tunc* (after the stay was lifted) was valid or void.

> [Proponent] proffers the argument that the September 16, 1992 order confirming that April 6, 1992 foreclosure judgment *nunc pro tunc* was a validly entered order that was not obtained during the debtor's bankruptcy proceeding. * * *. Although this is a gracious attempt to avoid the consequences of violating the automatic stay, such an argument belies the obvious meaning of judgments that are void *ab initio.* "Ab initio" is from the Latin meaning "[f]rom the beginning." BLACK'S LAW DICTIONARY, 5TH ED. (1979). Accordingly, once the * * * judgment of foreclosure became void *ab initio* by virtue of the violation of the automatic stay, it was as if the entire foreclosure proceeding had never occurred. Consequently, there was nothing for the Superior Court judge to confirm *nunc pro tunc* on September 16, 1992.

In ***Clausen v. Carstens***, 83 Or App 112, 116, 730 P2d 604, 607 (1986), an action for wrongful receivership, the court found the appointment of the receiver was void, consequently the receiver was a trespasser *ab initio,* entitling plaintiffs to damages. Oregon federal retirees had a right to sue to recover the state income taxes they had paid on retirement benefits [***Vogl v. Dept. of Rev.***, 327 Or 193, 960 P2d 373 (1998)] after the United States Supreme Court held that a state taxing system unconstitutionally discriminated against federal retirees, ***Davis v. Michigan Dept. of Treasury***, 489 US 803, 817, 109 SCt 1500, 103 LEd2d 891 (1989). Amounts collected under county orders later found to be unlawful are credited to the wronged party. ***Hilton v. Lincoln County***, 178 Or 616, 623-624, 169 P2d 329, 332 (1946). PGE itself has availed itself of this principle: in ***Portland General Elec. Co. v. City of Estacada,*** 194 Or 145, 241 P2d 1129 (1952), PGE successfully challenged annexation of lands including its

power plant on the grounds that annexation proceedings were void *ab initio*, as instituted for the sole purpose of taxing its property.

PGE's proffer of this argument makes no sense in context. If the entire rate order were wiped off the rate schedules *ab initio*, then the reasoning of ***Clausen v. Carstens*** applies: there was no valid rate order superceding the prior rates in effect under UE 48. No action taken under the UE 88 order could be lawful. A void *ab initio* order cannot be revived by reissuing it after the stay is lifted, as "there was nothing" to confirm *nunc pro tunc*. Once again, the paths lead the Commission to the same result: it cannot retroactively re-do its rate order to "take effect" in 1995.

IV. THE COMMISSION CANNOT OFFER AN ADVISORY OPINION.

Nor can the Commission justify its retroactive rate redetermination activities by claiming that it may never actually "make" retroactive rates by considering a hypothetical ratecase but may instead opine that the hypothetical rates based on the new "patched up" record could have been just and reasonable anyway by interjecting facts and arguments that did not occur on the record in 1994-95. There is no Oregon authority for courts or this agency to engage in a purely advisory exercise about what other record might have been prepared in 1994-95 but was not. Such "advice" would have no practical effect in the absence of any asserted power to order refunds or impose surcharges prospectively.

To the extent the Phase I exercise would be meant to "advise" the judiciary or a jury about the impact of the illegal charges on their bills ("We would like you to know that we could have found that the same rates would have been just and reasonable, anyway"), it

would be both gratuitous and contrary to separation of powers principles discussed in the CAPs Opening Comments. Granted, the OPUC has some quasi-judicial powers, but rendering advisory opinions is not one of them. Issuing advisory opinions is not a judicial function in Oregon. ***In re Constitutionality of ORS 456.720*****,** 272 Or 398, 406, 537 P2d 542, 546 (1975); ***In re Ballot Title***, 247 Or 488, 492-495, 431 P2d 1 (1967); ***Hickey v. City of Portland***, 165 Or 594, 597-598, 109 P2d 594 (1941). "We have no constitutional provision in Oregon granting authority to the courts to render advisory opinions. In the absence of such constitutional authority, courts cannot render valid advisory opinions." ***Oregon Creamery Manufacturers Association et al. v. White et al.***, 159 Or 99, 109-0, 78 P2d 572 (1938).[4]

What PGE wants Phase I to do is to reach a conclusion which has no effect on past-charged rates but will somehow be binding upon the legal rights of CAPs to seek statutory damages or restitution for violations of the illegal Utility Practices Act. Thus, Phase I is an "advisory" ratecase. This kind of advisory opinion foreclosing actual litigation of rights is prohibited in Oregon. "Even where they are allowed [in other jurisdictions], advisory opinions generally deal with questions of governmental organization, powers, or procedures, not with the constitutional rights of individuals." ***Matter of Constitutional Test of House Bill 3017,***

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4. The Commission's statutory quasi-judicial authority under ORS 756.450 is a delegation of the "judicial power" of Article VII, § 1, of the Oregon Constitution. That power does not include the power to issue mere advisory opinions. **All** exercises of judicial power in Oregon require a justiciable controversy. Any proceeding "must be more than a request for an advisory opinion; as an exercise of the 'judicial power' under Article VII (amended), section 1, it requires a justiciable controversy between the parties. ***La Grande/Astoria v. PERB,*** 281 Or 137, 139 n 1, 576 P2d 1204 (1978)." ***Oregon State Shooting Society v. Multnomah County***, 122 OrApp 540, 543, 858 P2d 1315, 1318 (1993).

Oregon Laws, 1977, 281 Or 293, 301 574 P2d 1103 (1978). Sweeping opinions offering advice cannot "bind the courts in subsequent litigation." *Id.*

V. *UNITED STATES V. CALLERY PROPERTIES* INVOLVED TEMPORARY RATES CONDITIONALLY IN EFFECT WITH NOTICE OF POTENTIAL REFUNDS.

United States v. Callery Properties, 382 US 223, 227 (1965), is inapposite, as the rates at issue were temporary, allowed as a condition upon conditional approval of applications for certificates of convenience to sell gas interstate. A producer needs a certificate to engage in interstate sales (§ 7 of Natural Gas Act), and the contract rates are generally set under § 5. The case upheld the Federal Power Commission's authority to impose, as a condition to the granting of a new certificate of public convenience and necessity (§ 7 certificate proceeding), interim limitations on the maximum rates charged for delivery of gas.

Callery arose in the following context. In 1958-1959 the FPC had granted unconditional certificates of public convenience and necessity to numerous producers of gas in south Louisiana. The sales contracts of the producers called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf, substantially higher than other contract rates at the time. After deliveries commenced under those contracts, consumers challenged the orders in various courts of appeals. One Court of Appeals had sustained the Commission's action.[5] The Supreme Court vacated the judgment[6] for reconsideration in light of ***Atlantic Refining Co. v.***

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5. ***United Gas Improvement Co. v. Federal Power Comm'n***, 269 F2d 865 (3rd Cir 1959).

6. ***Public Service Comm'n, of State of New York v. Federal Power Comm'n***, 361 US 195, 80 SCt 292, 4 LEd2d 237 (1959).

Public Service Comm'n (***CATCO***), 360 US 378, 79 SCt 1246, 3 LEd2d 1312 (1959), and the other courts of appeal remanded the other pending appeals to the Commission.

CATCO clarified that the Commission was not required to approve certificates of public convenience for gas to be sold in the interstate market at the producer's contract price but could condition the approval of such a certificate upon accepting temporary contract prices pending determination of just and reasonable rates under § 5, 52 Stat 823, 15 USC § 717d. 360 US at 388-391, 79 SCt at 1253-1255. Without the conditional approval of interstate sales, coupled with interim rates subject to refund if they end up higher than the later-determined just and reasonable level, delay in the rate proceeding would irreparably harm gas customers. The situation provided "good cause" to waive the usual procedure for rate determinations and to approve contracts temporarily and only as a condition of the § 7 certificate. Natural Gas Act, §§ 4(d), 5(a), 15 USC §§ 717c(d), 717d(a). Following ***CATCO,*** the Commission instituted an area rate proceeding for south Louisiana and consolidated the remanded certificate cases with that area rate proceeding. The FPC duly issued an order notifying applicants that the rates were subject to refund. Appendix 1. The interim rates were set as those "in line" with other contracts.

Callery was the appeal of the first orders resulting from the remanded appeals. In ***Callery***, the Court approved the FPC orders which conditioned permanent certificates at a price "in line" with the price level at which substantial amounts of gas had been certificated to enter the interstate market under contemporaneous certificates. The U.S. Supreme Court held that:

(a) in a § 7 certificate proceeding, the FPC has the power to condition permanent certificates to forbid the filing of rate increases above a specified level for a limited period of time, and

(b) the FPC had the statutory authority to order refunds of amounts collected pursuant to permanent certificates which were subsequently judicially reversed.

Thus, the case hinges on the statutory authority of the regulator to impose temporary rates pending a final order. ***Callery*** did not alter the law that the FPC (now Federal Energy Regulatory Commission) cannot impose a retroactive natural gas rate change and may not order reparations. ***Arizona Grocery Co. v. Atchison, T. & S.F. Railroad Co.***, 284 US 370, 52 SCt 183, 76 LEd 348 (1932). The regulatory scheme "bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." ***Arkansas Louisiana Gas Co. v. Hall***, 453 US 571, 578, 101 SCt 2925, 2931 (1981). The underlying error in the 1958-59 orders was the Commission's initial failure to make the sales contract rates interim and subject to refund as a condition of granting the § 7 certificate. The FPC then followed the court's instruction, and its power to use conditional rates was upheld.

The Order underlying the ***Callery*** appeal, "Order Denying Motions Dismissing Petition and Issuing Notice of Refund Obligations," advised the producers of their potential obligation to refund any amounts eventually found to be not just and reasonable by the FPC:

> We have concluded, as to all rates collected by the applicants for the sales involved in these proceedings, that we should explicitly impose upon each applicant, to the extent that we are empowered to do so, an obligation to refund any amounts collected in excess of the amounts which would have been collected under the rate or rates finally determined in these proceedings to accord with the requirements of the public convenience and necessity..

27 FPC 15, 1962 WL 4046 (FPC).

VI. URP AND THE CAPS ARE NOT MERELY SWITCHING POSITIONS WITH PGE.

The PGE Opening Comments, p. 11, points out that PGE and URP brought various state court cases to the attention of Judge Lipscomb. It is not true, however, that the litigants have merely done a do-si-do, switched legal positions, and now advocate the line of cases propounded by the adverse party in the in ***Dreyer*** and the UM 989 appeal.

As noted, in ***Dreyer*** the briefing by the CAPs to Judge Lipscomb and the Oregon Supreme Court focused on whether the filed rate doctrine was an absolute defense to civil suit for illegal utility practices and restitution. The UM 989 appellate briefing by URP was in the context of the role of the reviewing court in a rate appeal. The OPUC argued consistently that it lacked authority to revisit rate orders. The question then became: Could the Court itself calculate refunds, or perhaps order the OPUC to calculate refunds? The briefing to Judge Lipscomb in the UM 989 appeal had concluded before ***Dreyer*** confirmed Judge Lipscomb's rulings in the class action that the CAPs had a civil remedy for the illegal charges under OPUC Order No. 95-322 (UE 88), regardless of ORS 757.225, which might have altered the trial court's reasoning at the time of entry of order.

The question presented in Phase I of this proceeding does not seek comment upon the authority of the reviewing court in a rate order appeal to provide express instructions to OPUC about recalculating rates. It is clear that there were no such instructions in the UE 88 remand. Concerning the unlawful Trojan profits, the Court of Appeals did not issue any instruction in its remand of the cases arising from the appeal of the UE 88 order, nor did the trial court. There is no line of cases that PGE, URP or the CAPs have ever cited for the

proposition that the Commission has the power to re-open past rate periods or redetermine conclusive facts absent explicit instructions upon vacation of the regulatory order.

As a point of clarification, CUB errs in characterizing ***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), as holding the entire the "rate order invalid." As a party to the case, it is well aware that the Court of Appeals decision remanded only the orders in DR 10 for "reconsideration,"[7] which in context is an instruction to correctly state the law henceforth in the declaratory orders. But the decision in the consolidated appellate cases does not "hold" any other order entirely "invalid," nor does the mandate instruct that the order in UE 88 be vacated or modified in any manner.[8] The trial court thereafter remanded to the OPUC without instructions.

A. THE *MANDEL* LINE OF CASES PROFFERED BY PGE TO THE COURTS MAY BE RELEVANT TO THE UM 989 REMAND.

In both the class action and the UM 989 appeal, PGE relied upon ***Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.***, 2 Ill2d 205, 117 NE2d 774 (1954), and ***Keco Industries v. Cincinnati & Suburban Bell Telephone Co.***, 166 Ohio St 254, 141 NE2d 465,

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7. Judgments in case numbers A86940 and A86973 reversed and remanded with instructions to remand orders to PUC for reconsideration; judgments in case numbers A92935 and A93400 affirmed on appeals and cross-appeals.

CUB/URP v. OPUC, 154 OrApp at 717.

The appeals of Orders Nos. 93-1117 and 93-1763 were Marion County Circuit Court No. 94C 10372 (A86940) and No. 94C 10417 (A86973), appeals from judgments entered by the Hon. Richard Barber.

8. The appeals of Order No. 95-322 were Marion County Circuit Court No. 95C-11300 (A92935) and No. 95C-12542 (A93400), appeals from judgments entered by the Hon. Paul Lipscomb.

cert denied, 355 US 182, 78 SCt 267, 2 LEd2d 187 (1957). These cases stand for the general principle that the regulator cannot order refunds when rate orders were found invalid on appeal. Upon close examination, however, those cases both hinge on the statutory stay provision in state law. Illinois and Ohio had statutes allowing an aggrieved ratecase party to post a bond staying the rate order pending judicial review, much like ORS 756.590. The courts in those cases refused to allow regulatory refunds, where no party had attempted to stay the higher rates in the manner provided by statute, concluding that the provision for a stay abrogated common law restitutionary remedies by the regulator. As stated in ***Keco***:

> Restitution, on the basis of unjust enrichment, is a common-law remedy designed to prevent one from retaining property to which he is not justly entitled. * * *. [T]he problem before us is whether that remedy is available in the present case, or whether such remedy, in relation to the present situation, has been abrogated either directly or indirectly by statute.

The court answered its question:

> [B]y providing a method whereby such rates may be suspended[9] until final determination as to their reasonableness or lawfulness by the Supreme Court, [the General Assembly] has completely abrogated the common-law remedy of restitution in such cases.

Keco, 141 NE2d at 469.

PGE's reliance upon those cases to Judge Lipscomb in ***Dreyer*** amounted to an assertion that the CAPs could not sue to recover the illegal Trojan profit charges, because some other parties (CUB and URP, for example) to the UE 88 rate order appeal did not post a bond and suspend the rates ordered by OPUC Order No. 95-322 in 1995. We know with certainty from

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9. The possibility of a stay as an effective remedy may be more illusory than real when dealing with consumer's claims, because of the difficulties in posting a bond. See E. Levin, *Illinois Public Utility Law and the Consumer: A Proposal to Redress the Imbalance*, 26 DE PAULLREV 259, 268-69 (1977).

Dreyer that the potential for a stay in a rate case appeal has no impact on the availability of a later civil suit remedy by another party. However (although PGE seems to abandon the argument to the Commission), there does still remain an open question whether the stay provision of ORS 756.590 in effect during the appeal of OPUC Order No. 95-322 has any relevance to the authority of the OPUC after remand. In short, is a stay a jurisdictional prerequisite to OPUC authority to proceed with any remedy after remand from the courts? URP did move for a stay in the UM 989 appeal to the Circuit Court, but Judge Lipscomb denied the request in his order finding those rates also to be unlawful. He concluded that the request for stay was moot, because (in his view) ratepayers could somehow get back the unlawful charges in the future. Before the Circuit Court, the OPUC took the position that no stay was available in any event.

As for the cases which URP urged for the court's consideration in analyzing the power of the circuit court in an appeal of a rate order to order refunds in UM 989, Judge Lipscomb chose a path other than that followed in any of the cases. In the state court cases brought to the attention of Judge Lipscomb in the UM 989 appeal which ordered refunds to ratepayers, the court either (1) had express power to order a restitutionary decree; or (2) vacated or set aside the challenged regulatory order and then ordered refunds because there was no other remedy under the state regulatory scheme. We all now know with certainty that there is another remedy under Oregon law, as reaffirmed in ***Dreyer***, and so a reviewing court need not resort to the extraordinary powers of equity upon judicial review of a rate order in order to restore money unlawfully taken from ratepayers.

However, assuming, *arguendo*, that (1) the court could order the OPUC to recalculate rates at all and (2) such court action could give the OPUC authority to do under court order what it lacks legislative authority to do independently, several questions remain:

1. Has the OPUC acquired such authority to recalculate rates in the UM 989 order in the absence of a stay of the provisions of the order pending appeal?

2. Has OPUC acquired the authority to recalculate rates in the UM 989 order in the absence of a remand order setting aside the challenged OPUC order?

If the answer to both (1) and (2) are "YES," then:

3. Has the OPUC implicitly acquired authority to recalculate rates in the UE 88 order in the absence of a stay of the provisions of that order pending appeal?

4. Has OPUC implicitly acquired the authority to recalculate rates in the UE 88 order in the absence of a remand order setting aside that challenged OPUC order?

5. Has OPUC acquired the authority to recalculate rates in the UE 88 order in the absence of a remand order including express instructions to redetermine rates for the period of time the UE 88 was in effect which would have been just and reasonable nunc pro tunc?

For different reasons, the cases cited by PGE and URP ***(Mandel Brothers, Inc.***, ***Keco Industries***, ***Conservation Council of North Carolina***) and the cases in the following section each suggest that OPUC has not acquired the authority to recalculate rates.

B. OTHER STATES EXPRESSLY GRANT EITHER THE COMMISSION OR THE REVIEWING COURT AUTHORITY TO ORDER RATE REFUNDS.

There is no "line of cases" following ***State ex rel. Utilities Com'n v. Conservation Council of North Carolina***, 312 NC 59, 320 SE2d 679 (1984), as PGE states. The North Carolina regulatory scheme is unique. It specifically empowers the Commission to order rate

refunds and requires that interest be paid. The North Carolina cases thus involve a reviewing court ordering the Commission to exercise refund authority vested by statute in the Commission. They support the more general proposition that CAPs have urged: Absent express authority, Commissions do not have any retroactive ratemaking authority or refund power.

In Michigan, the Courts have express equity jurisdiction upon review of Commission orders. That judicial power exceeds the authority of reviewing courts under Oregon law. Michigan circuit courts are expressly empowered to decree restitutionary remedies upon appeal of a rate order.[10] ***Pennwalt Corp. v. Michigan Pub. Serv. Comm'n***, 311 NW2d 423 (Mich Ct App 1981).

C. STATE COURTS HAVE OCCASIONALLY ORDERED REFUNDS UNDER EXTRAORDINARY EQUITY POWERS IN JURISDICTIONS WHICH HAVE NOT PRESERVED ANY OTHER RATEPAYER REMEDY.

Those state courts which have ordered refunds to ratepayers after vacating a commission order have reached that result by reasoning that, without a judicial order of refund, there was no remedy available at all under any other statute. ***Mountain States Tel. & Tel. Co. v. Arizona Corp. Commission***, 124 Ariz 433, 435, 604 P2d 1144, 1146 (1979). The Missouri Supreme Court acknowledged that it could not order the regulatory commission to exceed its power and thus invoked its own extraordinary powers of equity to directly order the utility

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10. MCL § 462.26(a); MSA § 22.45(a) governs appeals from commissions are made to the circuit court, "and the same shall proceed, be tried and determined as other chancery suits. * * * and the said circuit court in chancery is hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, *and to make such other order or decree as the court shall decide to be in accordance with the facts and the law*." (emphasis supplied)

before it in the appeal to refund rates under supervision of the lower court. ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission***, 33 PUR4th 273, 585 SW2d 41 (1979).

These cases are not especially helpful or applicable in analyzing the Phase I question, as no reviewing court (1) vacated the UE 88 order or (2) ordered refunds in UE 88. Nor is there any necessity to resort to equity in the absence of all other remedies, since there is indeed a potential alternative remedy through civil suit, according to ***Dreyer***. No case offered by URP (or the CAPs) suggests that any state court has ever ordered the agency to calculate refunds, where the court found another meaningful remedy existed.

1. ARIZONA.

The Arizona Supreme Court has held that, unless refunds were available to ratepayers for orders set aside by the Courts, due process concerns would arise if there was no remedy available under Arizona law. In ***Scates v. Arizona Corporation Commission***, 118 Ariz 531, 578 P2d 612 (1978), the intermediate court held that an increase in rates for certain services by Mountain States Telephone and Telegraph Company was invalid, because the increase had been allowed in violation of Article XV, § 14, of the Arizona Constitution (requiring the commission to ascertain the value of the utility's rate base in setting rates). The court's mandate required the Corporation Commission to set the rate increase aside. The commission ordered a refund, and Mountain States appealed the refund order. The Arizona Supreme Court noted that the rate order had been set aside by the court, leaving no lawful rates in effect for the time period. Since the commission could not itself set aside rates, and Arizona

had no stay provision, the judicial review process would be meaningless unless the court's setting aside of the order allowed refunds in that situation.

> Unless the possibility of a refund exists, there is no effective remedy whatever for alleviating the effects of an invalid rate increase during the time that it takes the courts to reach a decision on review. If Arizona judicial decisions setting aside a rate increase were to be given prospective application in all cases, a determined Commission could theoretically perpetuate an unlawful rate indefinitely by approving anew the unlawful rate following each judicial determination. Such a result would fly in the face of our statutes providing for direct review of Commission orders by parties to the proceedings, and giving such cases priority over all but election matters. A.R.S. s 40-255. If there is no possibility of refund, each day spent in litigation would redound to the permanent financial benefit of the utility and give it every incentive for delay. In fact, the unavailability of either a stay mechanism or a refund suggests due process of law shortcomings.

Mountain States Tel. & Tel. Co. v. Arizona Corp. Commission, 124 Ariz 433, 435, 604 P2d 1144, 1146 (1979).

2. MISSOURI.

The Missouri Supreme Court acknowledged that the Commission could not order refunds but directed the circuit court to determine and order refunds itself, under inherent equitable powers to direct the utilities before it to make restitution. Otherwise, no remedy was available under Missouri law. "[F]ailure to exercise this power would strip this court of the ability to make a meaningful judgment, for payment under an unlawful order such as the surcharge here at issue will nearly always be already complete by the time the often lengthy appeals process is concluded."

> We remand to the circuit court for a determination by it of the amounts due as a result of the surcharge and to whom, the proper method of restitution, and in connection therewith a determination of such other matters and the making of such other orders as are necessary to and consistent with this opinion.

State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,

33 PUR4th 273, 585 SW2d 41, 60 (1979).

3. NEW HAMPSHIRE.

In ***Appeal of Granite State Elec. Co***., 421 A2d 121 (NH 1980), the court held that the Public Utilities Commission was properly empowered to order a refund of certain revenues collected under rates established on a rate base that included customer advances and deposits, reasoning that the commission had express statutory power to award reparations for unjust enrichment. This reasoning in inapposite to Oregon law, as no reparation authority exists in Oregon, and none ever existed for electric utility overcharges. ***McPherson et al v. Pacific P. & L. Co.***, *supra*; ***Oregon-Washington Railroad & Navigation Co. v. McColloch***, 153 Or 32, 49, 55 P2d 1133 (1936). We have discussed Oregon's brief experiment with limited reparation authority at CAPs Opening Brief, pp. 6, 30.

D. OREGON'S STATUTORY SYSTEM IS COHERENT.

CUB (p. 9) argues that there may be an "implicit finding that the legislature intended that, when a utility allows the Commission to violate [ORS] 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."

First, CUB has misidentified the entity with a statutory and common law duty. ***Dreyer*** makes it clear that the duty is upon the utility to not violate ORS 757.355. This is not a passive duty that is breached by "allowing" the OPUC to enter the very order that the utility advocated.

Second, it should be apparent from ORS 756.200 and 756.185 that the Legislature intended to preserve and cumulate remedies for illegal utility practices (such as violation of ORS 757.355) and contemplated that the OPUC might be circumscribed or without power to fully remedy a situation. As noted above, there are several legislative models in states which allow *only the court*, and not the commission, to order refunds. Oregon's scheme, which allows civil remedies in many situations where the OPUC cannot act, is quite comprehensive. 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)

VII. EFFECT OF OAR 860-021-0135.

In civil litigation, both PGE and PacifiCorp have asserted that OAR 860-021-0135 serves to express the full extent of the Commission's authority to order refunds for under- or over-billings. The rule does not authorize retroactive ratemaking or redetermination of rates. We attach an example of this argument, submitted recently by PacifiCorp, in the Appendix.

The CAPs do not advance this line of argument but note that, if it were adopted by the Commission, it would preclude most refunds for the 1995-2000 period, as the error was not conclusively "known" until early January 2003 (after the time for petitions for reconsideration had elapsed and mandate became final), and the period of time encompassed in UE 88 ended October 1, 2000 (the effective date of OPUC Order No. 00-601, the first order changing the rate treatment for Trojan investment established by OPUC Order No. 95-322). Thus a 3 year look-back would extend to early 2000.

Belozer Poultry Farms, Inc. v. Portland General Electric Company, (UC 201) Order No. 92-825, (June 8, 1992) illustrates that the Commission has consistently held that its authority to order refunds is (1) limited and (2) distinct from the role of the courts. Belozer, a farm customer, had a number of service accounts, some dating from before 1981 and some opened in 1986 and later. It qualified as a small farm customer and should have been billed at Schedule 32 rates under the Northwest Power Planning and Conservation Act exchange, but was charged under Schedule 31.

In 1992 it filed a complaint with the OPUC. The Commission held that it could not order utility refunds even when the customer had been charged a wrong, higher rate for over a decade. It did conclude that it could order refunds, limited to 3 years without interest, for

charging the wrong charges on the newer accounts because the utility had breached a separate duty to inform a customer of the most advantageous rate.[11] The Commission did agree that charging the Schedule 31 rate was an "overbilling," but it also noted that it had a limited role in resolving the entire dispute.

> Complainant's argument that the Commission should use a six-year statute of limitations in this case is not well taken. That statute of limitations is for contract actions, which are actions at law. The Commission has no jurisdiction over such actions. The Commission's rules limit refunds for overbilling to three years.
>
> * * *.
>
> Complainant asks for attorney fees. ORS 756.185(1) permits a court, not an agency, to award attorney fees if the court awards damages against the utility. The powers of administrative agencies are limited to those conferred by statute. No statute permits the Commission to award attorney fees. The Oregon Court of Appeals has specifically held that administrative agencies lack authority to award attorney fees. ***Johnson v. Employment Division***, 64 Or App 276, 280 (1983).

The ***Belozer Poultry Farms*** reference to an action at law (contract suit) and statutory (attorney's fees) remedies in court is entirely consistent with ORS 756.200 and ***Dreyer***. The Commission cannot exceed its limited authority and adjudicate civil and statutory claims. ***Belozer***, *supra*. Nor can it limit the power of courts to hear those claims, or prevent a ratepayer from cumulating the available remedies. ORS 756.200; ***Dreyer***, *supra*; ***Isom v.***

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11. OAR 860-21- 010(5) provides:

> At the time of application for new service, or upon subsequent request, the utility shall assist the consumer in selecting the most advantageous rate to meet individual service requirements. The consumer shall be responsible for making the final selection of a rate schedule.

PGE, *supra*.

Dated: July 20, 2007

Respectfully Submitted,

/s/ Linda K. Williams

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by US Mail, and by e-filing to the Filing Center, postmarked this date, and that I served a true copy of the foregoing REPLY COMMENTS OF THE CLASS ACTION PLAINTIFFS 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

/s/ Linda K. Williams

Linda K. Williams

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)

APPENDIX TO REPLY COMMENTS OF THE CLASS ACTION PLAINTIFFS (GEARHART, KAFOURY, MORGAN) ON THE PROFFERED QUESTION REGARDING REMEDIES

July 20, 2007

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

BETH ALT and DAVID DELK, individuals as representatives of the class of similarly situated electric service customers of PACIFICORP, abn PACIFIC POWER,

Plaintiffs,

vs.

PACIFICORP, a Maine corporation, doing business in Oregon under abn PACIFIC POWER,

Defendant.

No. 0510-10786

DEFENDANT PACIFICORP'S RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

RESPONSE

Defendant PacifiCorp submits the following Response to Plaintiffs' Motion for Partial Summary Judgment ("Motion"). In making this Response, PacifiCorp relies on ORCP 47, the points and authorities listed below, the June 1, 2007 affidavit of Jonathan Hale, the May 31, 2007 affidavit of Douglas L. Leeper, the affidavit of William Crow and the exhibits attached to those affidavits.

I. INTRODUCTION

Plaintiffs Beth Alt and David Delk ("Plaintiffs") allege that defendant PacifiCorp wrongfully overcollected and retained for its own uses a Multnomah County Business Income Tax ("MCBIT") billing adder from them and others similarly situated. Plaintiffs now seek partial summary judgment as to liability *only* on their claims for conversion, money had and received, and on their statutory claims for charging unlawful rates or discriminating between ratepayers. Disputed, genuine issues of material fact prevent entry of partial summary judgment.

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A. **OAR 860-021-0135 Applies to Both Meter and Non-Meter Related Billing Errors and, Thus, Limits Plaintiffs' Available Damages to a Three-Year Period.**

OAR 860-021-0135 should act to limit the scope of damages available to Plaintiffs for their common law and statutory claims for relief. Thus, although it is not directed at liability, its application in this case does create a question of fact as to whether Plaintiffs are even entitled to damages outside of the 2002-04 refund period for which they have already been refunded an amount in excess of what was overcollected.

Plaintiffs argue that OAR 860-021-0135, "Adjustment of Utility Bills," only applies to *usage* of electricity and errors in measuring the quantity of service provided. (Plaintiffs' Motion, p. 30.) From this argument, Plaintiffs assert that the regulation creates no limitation on a utility's liability, and that it is in fact only applicable as a "meter-reading rule" to be applied where there are errors in billing due to the accuracy of utility meters.[5] Plaintiffs misread the rule.

The plain language of OAR 860-021-0135(1) requires simply that the utility refund *overcollections* when an error occurs, subject to certain conditions. There is no reference to the cause of the overcollection or any fault by the utility, and *usage* is instead stated as a limitation on the ratepayers' potential remedy:

> (1) *When an underbilling or overbilling occurs*, the energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to such date. If no date can be fixed, the energy or telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six months' usage. In no event shall an *overbilling or underbilling* be for more than three years' usage.

[5] Plaintiffs also assert that PacifiCorp's tariff sheets indicate that PacifiCorp is "aware" that OAR 860-021-0135 "applies to *usage* only." (Plaintiffs' Motion, p. 30 (emphasis in original).) To the contrary, PacifiCorp's filing, as quoted in Plaintiffs' Motion, is a near-verbatim recitation of the OPUC regulation. (Plaintiffs' Motion, pp. 30-31.)

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OAR 860-021-0135(1) (emphasis added). Thus, under the plain language of the rule, there is no consideration of intent, duress or any other analysis of the utility's state of mind. *Id.* Overbilling is the conduct complained of here by Plaintiffs and it is the conduct regulated by OAR 860-021-0135. Usage is merely the measure by which taxes, fees, etc., may be apportioned to ratepayers under the regulatory scheme. Errors in meter reading are discussed at subsection (3), as Plaintiffs correctly point out, but that subsection is to be read as a condition potentially limiting the application of subsection (1), not a concurrent requirement.

The OPUC regulation defines on its face the largest permissible scope of the adjustment for overbilling relative to the date of error – no more than three years. Usage is simply the yardstick by which the overbilling is determined. Importantly, however, the rule was modified in 1983 to eliminate any ambiguity and, contrary to Plaintiffs' labeling of it as a "meter-reading rule," OAR 860-021-0135 applies to both meter and non-meter related overbilling:

> To eliminate this problem, Section (1) has been modified to treat all billing adjustments in the same manner. As revised, billing *adjustments for both meter and non-meter related errors* shall be made back to the date the error occurred, or up to six months if the date cannot be determined. The provision contained in the proposed rules to *limit the amount of an adjustment* to three years' usage has been retained.

(OPUC Order No. 83-284 at p. 6, Ex. B to Crow Aff. (emphasis added)). The regulation defines the scope of Plaintiffs' damages and as applied to the facts of this case, renders the claims of current ratepayers moot as they have already been refunded amounts overcollected for the three years preceding the discovery of the overcollections.[6]

[6] As already discussed, current ratepayers were refunded amounts in excess of what was overcollected from 2002-04 in accordance with PacifiCorp's reliance on OAR 860-021-0135. As such, current ratepayers are not entitled to damages on their claims for conversion, money had and received their statutory claims (*See* §§ VII-IX, *infra*).

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