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## VIA ELECTRONIC FILING

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PO Box 2148  
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**Re: Docket Nos. DR 10/UE 88/UM 989**

Enclosed for filing in the above-referenced dockets is PacifiCorp's Reply Brief in Phase II. A copy of this filing has been served on all parties to these proceedings as indicated on the attached certificate of service.

Very truly yours,

A handwritten signature in black ink, appearing to read "Katherine A. McDowell".

Katherine A. McDowell

Enclosures

cc: Service List

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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

DR 10/UE 88/UM 989

In the Matters of  
The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement, (DR 10)  
Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company, (UE 88)  
Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction. (UM 989)

PACIFICORP'S REPLY BRIEF  
IN PHASE II

PacifiCorp respectfully submits the following reply comments to the Opening Briefs of PGE, Staff, Citizens' Utility Board (CUB), the Class Action Plaintiffs (CAPs) and Utility Reform Project (URP).

I. REPLY COMMENTS

A. In Deciding this Case, the Commission Should Rely Upon Only the Actual Holdings of the Dreyer Decision.

The opening briefs describe *Dreyer v. Portland General Electric Co.*, 341 Or 262, 142 P2d 1010 (2006) in very different ways. According to PGE, *Dreyer* clarifies the Commission's broad authority to issue rate refunds. PGE Opening Brief at 2, 17. Conversely, CAPs and URP claim that *Dreyer* holds that the courts, not the Commission, should provide retroactive relief for illegal rates. CAPs Opening Brief at 2, 7; URP Opening Brief at 3-4. Staff suggests that *Dreyer* has either not changed the filed rate doctrine generally prohibiting rate refunds or surcharges or, if it did, it did so wrongly. Staff Opening Brief at 18-19.

1           The sensible and sustainable resolution of this case relies upon the correct  
2 interpretation of the *Dreyer* decision, one that neither overstates nor understates its  
3 meaning. This, in turn, requires the Commission to distinguish between the actual holdings  
4 of the *Dreyer* decision and its dictum. A court's statements that are not necessary to the  
5 disposition of the case before it are dicta and are not binding. *Berry v. State Tax*  
6 *Commission*, 241 Or 580, 399 P2d 164 (1965); *Godfrey v. Fred Meyer Stores*, 202 Or App  
7 673, 680, 124 P3d 621 (2005). This is "particularly appropriate when the dictum is difficult to  
8 reconcile with the reasoning of the balance of the opinion." *Id.*, citing *Cutright v.*  
9 *Weyerhaeuser Co.*, 299 Or 290, 301, 702 P2d 403 (1985) (court declined to rely on dictum  
10 that was a "questionable pronouncement" as to meaning of earlier workers' compensation  
11 statute).

12           There are two holdings in *Dreyer* necessary to the decision: (1) the refusal of the  
13 court to invoke the filed rate doctrine to dismiss the circuit court action because of the non-  
14 finality of the underlying OPUC decision (relying on ORS 756.565, which provides that rates  
15 are prima facie reasonable unless reversed on judicial review); and (2) the court's  
16 conclusion that the Commission had primary jurisdiction over the case, because it involved a  
17 remedy for collection of unlawful rates.

18           PacifiCorp's Opening Comments are based upon the impact that these specific  
19 holdings have on Oregon ratemaking principles: the first limits the scope of the filed rate  
20 doctrine to exclude cases on judicial review, while the second reinforces the traditional  
21 ratemaking paradigm in Oregon, stressing the Commission's preeminent role. Dictum aside,  
22 the *Dreyer* decision leaves other key ratemaking principles unaltered, including the rule  
23 against retroactive ratemaking, the bar on collateral attacks against Commission decisions  
24 and the recognition of the Commission's exclusive jurisdiction on issues involving the setting  
25 of rates.

26

1 The actual, limited holding of *Dreyer*, interpreted in the context of Oregon's otherwise  
2 unchanged ratemaking principles, is the source of PacifiCorp's position that the Commission  
3 may order a rate refund or surcharge only if: (1) the Commission is ordered to do so by a  
4 court on judicial review; and (2) the parties have sufficient notice of a potential refund or  
5 surcharge to make such an order consistent with the rule against retroactive ratemaking.  
6 See *Dreyer*, 341 Or at 284, 286 (noting that the Commission had received two remand  
7 orders on judicial review directing it to fashion a remedy).

8 The claim of CAPs and URP that *Dreyer* recognizes a new rate-related civil damages  
9 action in lieu of a Commission-based remedy is based upon dictum that is "difficult to  
10 reconcile with the reasoning of the balance of the opinion," which abated the civil damages  
11 action on the basis that the Commission had primary jurisdiction over it. Similarly, the claim  
12 of PGE that *Dreyer* authorizes the Commission to broadly provide retroactive remedies is  
13 based upon dictum that is inconsistent with the actual holding of *Dreyer*, directing the  
14 Commission to exercise its primary jurisdiction to resolve this express issue in the first  
15 instance.

16 **B. The Filed Rate Doctrine and the Rule Against Retroactive Ratemaking Apply To**  
17 **Courts and the Commission Alike.**

18 CAPs argue that the filed rate doctrine and the rule against retroactive ratemaking  
19 bar the Commission from ordering a rate refund or surcharge for an illegal rate. At the same  
20 time, they assert that these principles do not bar a civil court from ordering monetary relief to  
21 address an illegal rate. The CAPs thus argue that they have a broader right to retroactive  
22 rate relief in the civil courts than at the Commission.

23 The CAPs' position is inconsistent with the principle that the Commission has plenary  
24 authority over ratemaking and the rule barring collateral attacks against Commission orders.  
25 Indeed, the filed rate doctrine and the rule against retroactive ratemaking are judicially  
26 created doctrines that not only apply to civil courts, they apply *especially* to civil courts. The

1 limitations that CAPs claim for a Commission-ordered refund apply with even greater force  
2 to prevent a civil court from awarding retroactive rate relief in the form of a damages award.

3         The filed rate doctrine has two primary purposes. First, it “prevent[s] carriers from  
4 engaging in price discrimination as between ratepayers (the ‘nondiscrimination strand’).”  
5 *Gallivan v. AT&T Corp.*, 124 CalApp 4<sup>th</sup> 1377, 1382 (2004) (citing *Evanns v. AT&T Corp.*,  
6 229 F.3d 837, 840 (9<sup>th</sup> Cir. 2000); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2<sup>nd</sup> Cir. 1998)).  
7 Second, it preserves “the role of regulatory agencies in deciding reasonable rates for public  
8 utilities and services” (the “nonjusticiability strand”). *Qwest Corp. v. Kelly*, 204 Ariz. 25, 35,  
9 59 P3d 789 (Ariz App 2000). This second purpose “keep[s] courts out of the rate-making  
10 process [...], a function that the federal regulatory agencies are more competent to perform.”  
11 *Gallivan, supra* at 1382. “Thus, the filed rate doctrine bars not only lawsuits challenging filed  
12 rates or seeking to enforce rates different from the filed rates, but also lawsuits challenging  
13 services, billing or other practices when the challenge, if successful, would effectively result  
14 in a modification of the filed tariff through the award of damages.” *Gallivan, supra*, at 1382.

15         The “nonjusticiability” prong of the doctrine is key. Regulatory agencies “are deeply  
16 familiar with the workings of the regulated industry and utilize this special expertise in  
17 evaluating the reasonableness of rates. The agencies’ experience and investigative  
18 capacity make them well-equipped to discern from an entity’s submissions what costs are  
19 reasonable and in turn what rates are reasonable in light of those costs.” *Qwest Corp.*,  
20 *supra*, at 35, quoting *Wegoland Ltd. V. NYNEX Corp.*, 27 F.3d 17, 20-21 (2d Cir. 1994). “If  
21 courts were licensed to enter this process under the guise of ferreting out fraud in the rate-  
22 making process, they would unduly subvert the regulating agencies’ authority and thereby  
23 undermine the stability of the system. For only by determining what would be a reasonable  
24 rate absent the fraud could a court determine the extent of the damages. And it is this  
25 judicial determination of a reasonable rate that the filed rate doctrine forbids.” *Qwest Corp.*,  
26 *supra*, at 35, quoting *Wegoland Ltd., supra*, at 20-21.

1 CAPs argue that the filed rate doctrine is inapplicable to their civil court action  
2 because any award would constitute damages rather than ratemaking. The courts have  
3 historically rejected this semantical distinction. In *Gallivan*, the court rejected plaintiff's  
4 attempt to distinguish ratemaking from monetary damages, noting that the plaintiff "ignores  
5 the fact that she seeks monetary damages in the form of a refund of the SLC paid. 'The  
6 underlying conduct [of the defendant] does not control whether the filed rate doctrine  
7 applies. Rather, the focus for determining whether the filed rate doctrine applies is the  
8 impact the court's decision will have on agency procedures and rate determinations.'"  
9 *Gallivan, supra*, at 1386, citing *Marcus, supra*, at 59 (internal citations omitted).

10 **C. The Statutes Governing Judicial Review of the Commission's Orders Have**  
11 **Changed, But Not in a Manner Material to the Issues in this Case.**

12 In PacifiCorp's Opening Brief, PacifiCorp cited ORS 183.486 as the authority for a  
13 court on judicial review of a Commission order to direct a rate refund. ORS 183.486, in turn,  
14 applies to contested cases on judicial review under ORS 183.484. Currently, as a result of  
15 SB 489 enacted in 2006, judicial review of a Commission order is expressly pursuant to  
16 these statutes, both of which are a part of the Oregon Administrative Procedures Act (APA).  
17 ORS 756.610(1).

18 CAPs correctly explain that at the time of the reviewing court decisions in this case,  
19 judicial review of Commission orders was authorized under ORS 756.580 and the scope of  
20 court review was stated in ORS 756.598. See CAPs Opening Brief at 3. CAPs are  
21 incorrect, however, that the provisions of ORS 183.484 (and by extension, the provisions of  
22 ORS 183.486) were not applicable to judicial review of Commission orders. *Id.* at 3, n.6.  
23 ORS 183.315(6) contains the exemptions to the Oregon APA for the Commission. Prior to  
24 passage of SB 489, this statute did not exempt the Commission from either ORS 183.484 or  
25 ORS 183.486, notwithstanding the existence of ORS 756.580 and ORS 756.598. Thus, the  
26 statutes combined formed the authority and scope of judicial review of Commission orders.

1 Both ORS 756.598 and ORS 183.486 allow a court on judicial review to remand the order to  
2 the agency.

3 **D. The Commission Should Consider the Authority of a Reviewing Court to Order**  
4 **a Rate Refund or Surcharge on Remand.**

5 For reasons that are not entirely clear, both CAPs and URP assert that the only  
6 remand order at issue in this case is the order in UE 88 (and not the order in UM 989).  
7 CAPs Opening Brief at 1, 3; URP Opening Brief at 1. Based upon this assertion, CAPs  
8 claim that the “extent of judicial power to order specific modifications or to order the OPUC  
9 to undertake action under the review statutes is not presented in Phase I...” CAPs Opening  
10 Brief at 3.

11 The issue for this phase of this case was adopted in a Ruling on June 6, 2007. The  
12 ruling does not support the position of CAPs and URP that the Commission’s review is in  
13 any way limited. Indeed, the Ruling expressly notes that the issue presented is very broad  
14 in nature and requires the parties to explore a number of underlying issues. One of these  
15 issues, certainly, is the extent of judicial power to order a rate refund or surcharge on  
16 remand of a Commission order.

17 **II. CONCLUSION**

18 PacifiCorp urges the Commission to resolve this case in the manner outlined in  
19 PacifiCorp’s Opening Brief, resolving this case in a fair and just manner and defining a  
20 coherent regulatory architecture for Oregon’s future.

21 DATED: July 20, 2007.

22 McDOWELL & RACKNER PC

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26 Attorneys for PacifiCorp

1 **CERTIFICATE OF SERVICE**

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