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VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
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Re: *DR 10/UE 88/UM 989*

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Enclosed for filing in each above-referenced docket are the original of Portland General Electric Company's Reply Brief with Respect to the Authority of the PUC to Award Relief. Five additional copies are also enclosed. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via e-mail and, if they have not waived paper service, by U.S. Mail. A photocopy of the PUC tracking information will be forwarded with each hard copy filing.

Very truly yours,

David F. White

DFW/ldh
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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)	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF**

The opening briefs of the other parties use Oregon court cases and ratemaking "doctrines" to reach their respective conclusions on Commission authority. This reply brief will first review the relevant cases and what they say on Commission authority. We will then discuss the ratemaking "doctrines." After that, we will respond to the opening briefs of the other parties.

I. THE CASE LAW

A. *Oregon-Washington R. & N. Co. v. Cascade C. Co., 101 Or 582, 197 P 1085 (1921)*

Facts: Defendant shipped rock over plaintiff's railroad. The railroad charged according to the actual weight, but no less than the minimum weight as marked on the railcars. This was the method in the applicable tariff on file with the Interstate Commerce Commission. The shipper sought to pay only the actual weight of the rock that was shipped, which was less. The railroad told the shipper it would apply for approval of a rate in accordance with the shipper's request, but did not do so.

Issue: What rate should the shipper pay?

Decision: The shipper should pay according to the applicable tariff on file.

Discussion: Federal statutes required the railroad to charge no more nor less than the tariff on file. The shipper was bound to know that was the applicable rate. This was a decision on federal rail rates and says nothing about Oregon utility regulation.

B. *Valley & Siletz R. R. Co. v. Flagg*, 195 Or 683, 247 P2d 639 (1952)

Facts: The railroad carried logs and lumber. Since the lumber was destined for out-of-state shipment, only the rate for logs was subject to the Commissioner's jurisdiction. The log shipper asked the Commissioner to lower the rate it had to pay, and the issue facing the Commission was how to allocate the railroad's indirect costs between the log shipments and the lumber shipments. The Commissioner ordered a lower rate into effect for the log shipments, but failed to make findings as to how indirect costs should be allocated between logs and lumber. The railroad filed suit in circuit court, asserting that the log rate was so low as to be confiscatory.

Issue: Was the rate for logs confiscatory?

Decision: The court was unable to decide that legal question since the Commissioner had not made adequate findings of fact.

Discussion: Although rate-making is legislative in nature, it is subject to judicial review. The courts cannot restrain an administrative agency from exceeding its powers unless it knows how the agency viewed the facts. The proper allocation of costs was integral to rate-making. Courts cannot do it themselves, cannot fill in the deficiencies of an incomplete rate order because the court reviews rate orders but does not attempt to exert authority over rates.

C. *McPherson v. Pacific P. & L. Co.*, 207 Or 433, 296 P2d 932 (1956)

Facts: In the fall of 1951, a hydro shortage required the temporary use of substantially more expensive steam generated power. In October 1951, the Commissioner

issued an order allowing PP&L to impose a temporary surcharge to cover the excess power cost. However, the hydro shortage abated and no surcharge was implemented. The shortage recurred in the fall of 1952 and PP&L wrote the Commissioner asking for authority to impose another surcharge. The Commissioner replied by letter authorizing the surcharge, which lasted five months. Several customers collaterally attacked the Commissioner order by filing a class action in Lane County Circuit Court, challenging the surcharge on various grounds.

Issue: Were plaintiffs entitled to recover the surcharge?

Decision: No.

Discussion: The respective jurisdictions of the Commissioner and of the courts are different. The courts alone have authority to award damages upon a complaint that "the charges were in excess of the lawfully filed schedule of rates."[1] The Commissioner alone has authority to decide whether existing rates are unreasonable, or unjustly discriminatory, and order changes as appropriate.[2] The only question for the court was whether the Commissioner had lawfully authorized the surcharge in question. 207 Or at 454. Although plaintiffs objected that the Commissioner's authorization was given merely by means of a letter, it was nevertheless sufficient in both form and detail to authorize the surcharge. Plaintiffs, therefore, had no cause of action.

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[1] This claim is known as "overcharges"—that is, charges collected by the utility in excess of the lawful tariff rate.

[2] As to railroad rates, the Commissioner also had the power under a separate statute to order "reparations," i.e., to issue an order that entitled a complainant to recover retroactively for past charges paid under an existing lawfully established rate. As to utility rates, however, the statutes did not give the Commissioner a similar power.

The opinion emphasizes that this action was not an appeal from the Commissioner's surcharge order. 207 Or at 459. If it had been such an appeal, the Court could have entertained arguments that the Commissioner erred in various ways.

D. *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 841 P2d 652 (1992)

Facts: Pacific Northwest Bell ("PNB") filed a revised rate schedule, and the Commission granted an interim increase, subject to refund depending on the outcome of its investigation. The Commission eventually determined PNB's revenues were excessive, and issued an order to reduce rates below the pre-filing level. One of the existing tariffs involved a charge for "Extended Area Service" ("EAS") that was mandatory on customers. As part of the reduction, the Commission ordered that this be changed to an optional charge, which would reduce PNB revenues by about $5 million per year.

PNB duly filed a compliance tariff that made the EAS charge optional, along with other compliance tariffs. Then, however, the Commission changed its mind about the EAS charge and rejected that particular compliance tariff. The Commission wished to study the EAS charge further, anticipated it would soon issue a new order with respect to it, and therefore rejected the new EAS compliance tariff, which would have soon been superseded. As a result, an existing tariff, which had been found to contribute to excessive revenues, continued in effect.

The Commission did not act as quickly on the EAS charge as it had expected, and the "excessive" but lawful EAS tariff continued in effect for more than a year. After CUB protested, the Commission eventually ordered a refund for past "overcollections."

Issue: Did the Commission have authority to order the refund?

Decision: Yes.

Discussion: The Commission attempted to justify its authority to order the refund under ORS 757.215(4) [later ORS 759.185(4) ,][3] contending that its rejection of the compliance tariff for the EAS charge was equivalent to the continuation of the interim increase it had previously authorized, and therefore subject to refund pursuant to that statute. The Court of Appeals rejected that characterization. It held that the interim increase ended with the order to reduce rates. Therefore, the statute did not authorize the refund of the EAS charges collected since that time.

The Court of Appeals nevertheless justified the refund order under a different rationale. The Commission possessed an implied power to order the refund so it could protect customers "from unjust and unreasonable exactions and practices," in accordance with the Commission's general powers pursuant to ORS 756.040.

The court's opinion contains the following language:

> "To hold that PUC does not have the power to order a refund of amounts over collected under temporary rates that failed to comply with an ordered revenue reduction would be inconsistent with its regulatory role and statutory duties. Such a holding would deprive PUC of much of its power to protect customers from abusive delay tactics or, as in this case, unexpectedly long delays in implementing an ordered revenue reduction. PNB is not entitled to retain excess revenues collected under an interim rate schedule that was not in compliance with the authorized revenue level, and PUC did not err in ordering PNB to refund those revenues."

Katz, 116 Or App at 310. The term "temporary rates," as used in the first sentence above, is not a statutory term. The opinion did not cite any statute that authorized different treatment for "temporary rates." Rather, the opinion called them "temporary rates" because it was the

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[3] At the time the Commission issued its decision, the Commission relied on ORS 757.215(4), while the statute cited in the opinion of the Court of Appeals is ORS 759.185(4). *Katz*, 116 Or App at 306 n 3. The *Katz* litigation overlapped the period when the statutes were changed to create a separate ORS chapter for telecommunications utilities. 1987 Oregon Laws ch 447 § 143. The effect of the two statutes, ORS 757.215(4) and ORS 759.185(4), was the same. *Katz*, 116 Or App at 306 n 3.

Commission's intention to change them soon, which intention was thwarted by "unexpectedly long delays." The lesson of *Katz* is not that there exists a special category of "temporary rates" subject to special rules nowhere to be found in the statutes. The lesson instead is that when the Commission makes a mistake—whether the mistake is acting too slowly to change what it intended to be "temporary rates" or whether the mistake is misinterpreting a statute—the Commission's general powers under ORS 756.040 authorize it to correct its mistakes.

E. *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or App 41, 898 P2d 774 (1995)

Facts: The Commission opened an "own motion" rate case pursuant to ORS 756.515 to investigate whether PNB was over-earning. CUB intervened and asked the Commission to require PNB to immediately file interim tariffs reducing its rates. After the Commission denied that request, CUB next asked it to declare PNB's existing rates to be interim and subject to refund if PNB was ultimately required to reduce its rates. The Commission denied that motion for lack of authority.

Issue: When the Commission opens an "own motion" rate case, does it have authority to declare existing rates to be interim and subject to refund?

Decision: No.

Discussion: CUB's argument echoed the *Katz* opinion, contending that the PUC's general powers under ORS 756.040 were broad enough to authorize the Commission to do what it asked. The Court of Appeals agreed with CUB that that general powers statute was indeed sufficiently broad to authorize it. Nevertheless, CUB's argument failed for a different reason. There were other, more specific, statutes that governed the Commission's authority to declare rates to be interim, and those statutes did not allow that power in the circumstances of this case. The opinion distinguished this situation from that in *Katz*, where the utility had "over-collected under temporary rules [sic: rates] that failed to comply with an ordered revenue reduction."

As we said in the discussion of *Katz* above, the notion of "temporary rates that failed to comply with an ordered revenue reduction" has no basis in the statutes. The "temporary rate" reference in *Katz* is simply a way of saying the Commission made a mistake by waiting too long to resolve the EAS issue. In the *Eachus* case, by contrast, no error was made by the Commission and the Commission's general powers had to be read in the context of the more specific statutes governing interim rate increases subject to refund.

II. CONCLUSIONS FROM THE OREGON CASES

No prior Oregon case deals with the Commission's authority to grant relief after a rate order is found improper and remanded by the Court.

Additionally, in our case now before the Commission, there is no specific statute that governs what the Commission can and should do when the Commission's error has been called to its attention, not—as in *Katz*—by the Commission's own belated realization of its error, but rather by the courts in the course of judicial review. In the absence of a specific statute that limits the Commission's powers on remand from the courts, the Commission's broad general powers under ORS 756.040 require it to do what is just and reasonable to rectify its error.

III. THE DOCTRINES

A. Filed Rate Doctrine

The "filed rate doctrine" is a shorthand phrase that is of no use in deciding this case. It is not found, let alone defined, in the statutes or regulations. The phrase has been used, but no Oregon court has imposed it upon the Commission. It therefore lends no authority to whatever decision the Commission may reach. Other courts in other jurisdictions have used it, but the sense varies according to the specific underlying statutory and regulatory law of the jurisdiction.

B. Retroactive Ratemaking

Neither is "retroactive ratemaking" a term to be found in the Oregon statutes. It is another shorthand phrase that means different things to different parties. The only Oregon case defining "retroactive ratemaking" is *Katz.* There, the Court of Appeals said it occurs "when past profits or losses are incorporated in setting future rates." 116 at 311, text at n 7. That is, it reflects the constitutional prohibition against using past results to impose confiscatory rates in the future. *Id.*

It has been said in the context of "retroactive ratemaking" that it is important that customers should know the rates in effect when they pay them. We offered that argument to the Supreme Court in *Dreyer* as support for our position, and it was rejected. The Supreme Court has ruled that rates based on a "return on" Trojan are vulnerable and subject to correction as appropriate.

IV. RESPONSE TO BRIEFS OF OTHER PARTIES

A. Staff's Brief

Until 11 months ago, we would have agreed with much of what Staff says in its brief. We ourselves made some of the same arguments to the Supreme Court in *Dreyer*. The difference between our position and Staff's is that we now accept the *Dreyer* decision as controlling, while Staff appears reluctant to do so. Staff's brief asks the Commission to endorse a view of the law that the Supreme Court has already rejected. On occasion, Staff states explicitly that it "disagrees with the Supreme Court's conclusion." (Staff brief at 19.)

We won some of our arguments in *Dreyer*, but Staff also appears reluctant to accept *Dreyer* with respect to the points we won. The Supreme Court declared the Commission has primary jurisdiction, and ordered a halt to the class action lawsuits so the Commission could exercise that jurisdiction. Staff's brief, however, suggests there is little for the Commission to do.

Whatever we may think of *Dreyer*, it is now the law, and we all have to follow it. ORS 1.1002(1).

1. When the Courts Have Identified a Commission Error, the Commission Cannot Refuse to Correct It

Staff begins its brief with the proposition that "[T]he Commission's authority to set rates is legislative and the Commission acts prospectively." (Staff Brief at 1.) That, of course, is partly true. The other part contains the essential points in this case.

When the legislature itself makes rates by enacting a statute, that is the end of it, assuming there is no constitutional violation. When the Commission makes rates, however, that is not the end of it. It is then up to the courts to say whether the Commission made a mistake.

The courts *have* said the Commission made a mistake (as in *Flagg*). The courts have said the Commission's 1993 declaratory ruling was erroneous in saying that subsequent rate orders could include a return on Trojan. What happens now?

We discussed the cases first to demonstrate that that question is not answered by any of the cases cited by the parties. In none of those cases did the Commission deal with a remand from the courts invalidating what the Commission had done. What can the Commission do to correct its error? According to Staff—nothing.

Before *Dreyer*, our answer used to be as follows: (1) the rates set by the Commission were lawful, notwithstanding the prospect of judicial review, because ORS 757.225 said they were lawful; (2) the only relief a party could ever have from those rates, unless and until the Commission made new ones, was to persuade a court to suspend them while judicial review was pending, pursuant to former ORS 756.610(2). Staff's brief still offers both parts of this same answer, buttressed by case law from other jurisdictions. Unfortunately, both parts were rejected by the *Dreyer* opinion, along with the case law from other jurisdictions. We therefore need a fresh answer.

Our answer now is that the Commission can and should correct its error. That is what any other administrative agency does when reversed by a court. That is what any lower court does when reversed by a higher court. Now that we know ORS 757.225 does not stand in the way of correcting past error, there is no other basis for refusing to do so. Since the Commission's "prospective" rate-making is by statute made subject to later judicial review, and then to even later remand proceedings, the statutory scheme requires the Commission to fix what it did before in error.

We draw the Commission's attention to the Supreme Court's opinion in *Hammond Lbr. Co. v. Public Service Com.*, 96 Or 595, 159 P 639 (1920):

> "[T]he suit [in circuit court to challenge the Commission's order] is authorized, not to make new rates, but only *to set aside* those established by the order of the commission."

96 Or at 603 (emphasis added). The Commission's order has been *set aside*; therefore, the Commission has a duty to replace it with a new order. The Supreme Court adopted the following reasoning:

> "[T]he courts are required * * * merely to exercise judicial power to ascertain and determine whether the commission has so far failed in its search for this lawful, just, and reasonable rate as to have found instead, and declared, that which is unreasonable. The result of the reversal of the order of the commission is not to establish this fact or ascertain this point of reasonableness, but to leave it undisclosed, leaving the former rates to stand or, *requiring the commissioners to try over again to find it.*"

96 Or 601 (emphasis added).[4]

Our answer, therefore, is that the commissioners must try again.

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[4] The Supreme Court was quoting from and adopting the reasoning of the Wisconsin Supreme Court in *Minneapolis etc. Ry. Co. v. Railroad Commission of Wisconsin*, 136 Wis 146, 116 NW 905 (1908). The *Flagg* holding is similar.

2. The Commission Does Have Statutory Power To Correct Its Previous Errors

Since the statutes explicitly provide that the courts can reverse a Commission order, we think they necessarily imply the Commission has power to comply with that reversal. *Former* ORS 756.598(1).

If that were not sufficient, however, the Commission does have explicit statutory power under ORS 756.040 to "do all things necessary and convenient" to supervise and regulate utilities and to protect the public. The *Katz* decision explicitly held that this statute gives the Commission the power to order refunds in circumstances where the statutes do not otherwise provide for them. The *Eachus* decision also said this statute was broad enough to authorize such a power in that case as well, were it not that it would contravene other, more specific, statutes that applied in the circumstances of the *Eachus* case. (*See* above at p. 6.) Therefore, the Commission has sufficient statutory power, pursuant to ORS 756.040 in this case, unless there is a more specific statute limiting that power, as in *Eachus*. No such statute has been identified now that ORS 757.225 has been ruled out by *Dreyer*.

Staff argues, however, that our argument for such a power is defeated by the *McPherson* opinion. Staff overlooks, however, the Supreme Court's statement in *Dreyer* that "*McPherson* does not adopt any rule about retroactive ratemaking." 341 Or at 271 n 10.

The rule that *McPherson* does adopt, however, is the same rule as *Eachus*. When the Commission did not make a mistake, the Commission has no authority to grant retroactive relief. Our situation, however, is unlike either *McPherson* or *Eachus*, but instead like *Katz*: the Commission made a mistake and there are no specific statutes controlling what the Commission should do upon reversal of its previous orders. The only statute that applies is ORS 756.040; therefore, the Commission has the power to do whatever is "necessary and convenient" in the exercise of what the Supreme Court has said is its primary jurisdiction.

3. The Holistic Nature of Ratemaking

Staff's brief explains the "holistic nature of ratemaking." (Staff Brief at 20-28.) We agree. We would add that Oregon courts have endorsed Staff's argument that there is no specific formula for making rates, and that "it is the end result that counts." *Eachus*, 135 Or App at 56; *Flagg*, 195 Or at 699.

We also agree with Staff that it would be inconsistent with this principle to simply order a refund of the "return on" Trojan that was collected. The Court of Appeals in *Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P2d 744 (1998), however, has not instructed the Commission to do that. Instead, the Court of Appeals harmonized ORS 757.355 (1978) and ORS 757.140(2) (1989) to conclude, "* * * ORS 757.140(2) authorized rates that would reimburse the utility for its principal investment in retired capital assets, but it does not authorize the return on the investment that ORS 757.355 proscribes."[5]

As a result, the proper method for setting rates for the retired utility plants was never fully resolved at the appellate level until this 1998 opinion. On this remand, the Commission must obey the Court of Appeals' directive, but it must also obey all the directives of the Oregon utility statutes. An important additional statute is ORS 756.062(2), which commands the Commission and the courts:

> "The provisions of such laws shall be liberally construed in a manner consistent with the directives of ORS 756.040(1) to promote the public welfare, efficient facilities and substantial justice between customers and public and telecommunications utilities."

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[5] *CUB*, 154 Or App at 716. One party to the *CUB* case, Utility Reform Project, argued that ORS 757.140(2) was inapplicable and the Commission decision in Order No. 95-332 should be based 100% on ORS 757.355, ignoring all other statutes. That position was rejected by the court without discussion.

To promote "efficient facilities," the Commission is entitled to establish policies to encourage retirement of generating plants when the retirement would be in the public interest. This is exactly what the Commission attempted to do in Order No. 95-322.

To promote "substantial justice between customers and public *** utilities," the Commission must take the remand from the *CUB* decision and give effect to both statutes that were harmonized by the Court of Appeals. This requires the Commission to engage in "holistic" ratemaking and determine just and reasonable rates, after correcting the initial mistake it made in harmonizing the two utility statutes. Setting just and reasonable rates is exclusively the work of the Commission, not the courts. *McPherson* at 454 ("We may not consider the unreasonableness or unjust discrimination of rates, since this demands the exercise of a quasi-legislative or administrative function of the Commissioner").

When the Commission set rates to recover the retired capital asset, Trojan, in Order No. 95-322, it mistakenly intertwined the components of capital recovery, "of" and "on," but in a way that resulted in just and reasonable rates and just and reasonable revenue levels overall. On remand, the Commission must establish just and reasonable rates, but by reestablishing revenue levels including only an "of" component for the retired capital asset.

As the *CUB* opinion recognized, it is lawful for the Commission to authorize "rates that would reimburse the utility for its principal investment in retired capital assets* * *" To simply pull the "on" component out of the just and reasonable rates set in 1995 would not accomplish this result. This is because the Commission, acting on a mistaken belief of law, delayed the full reimbursement of the "of" component by installment payments over 17 years.

It is not the purpose here to argue how the Commission can reestablish rate levels on this remand, but it is sufficient to point out that the Commission could lawfully authorize the reimbursement of all the principal investment in a short period of time or

assume the Trojan revenue requirement remained the same, but the "on" component was replaced with principal reimbursement and other appropriate adjustments.

Staff also correctly points out that the rate orders may have been "just and reasonable," even if "unlawful" for having violated ORS 757.355. What is more, the Commission formally concluded in Order No. 95-322 that the rates *were* just and reasonable, and *that* conclusion was never challenged or reversed. (Order No. 95-322 at 66.)[6]

4. Harmless Error

Staff also suggests the Commission's error in allowing the "return on" may have been harmless error, given that there were equivalent ways of reaching the same result. We agree, and suggest this may be the most straightforward solution to this case. After all, the Supreme Court, in *Dreyer*, expressly gave the Commission the task of deciding whether customers were harmed at all. The entire basis of what happened with respect to Trojan was that *customers were not harmed by closing Trojan.* That was the whole point of the Commission's insistence on Least-Cost Planning, and the net benefit test employed in Order No. 95-322. The lack of harm was a finding in Order No. 95-322 that was never challenged and never overturned. Order No. 95-322 at 29, 52.

For the Commission to properly conclude, based on substantial evidence, that the decision in Order No. 95-322 was harmless error requires the Commission to push

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[6] This point is underscored by the statute that governed judicial review of the Commission's decision at the time:

> "In the case of a modification or reversal the court shall make special findings of fact *indicating clearly all respects in which the commission's order is erroneous.*"

Former ORS 756.598(2)(emphasis added). In the appeals from Order No. 95-322, no court ever indicated the conclusion that the rates were just and reasonable was erroneous.

forward, lift its abatement of Phase 1, and decide on the merits what the 1995 rates would have been based on the remand from the courts.[7]

B. Response to CUB's Brief

CUB argues that the Commission does have power to correct its error in the special circumstances of this case. We agree, although we think the power is not as limited as CUB suggests. We also agree with CUB that the legislature gave no indication the Commission should be powerless to correct its own errors. And we agree with CUB's conclusion that the doctrine of retroactive ratemaking does not apply in this case.

C. Response to Briefs of PacifiCorp and Idaho Power

To the extent PacifiCorp adopts a more limited view of the Commission's authority than we do, we rely on our defense of our position as stated above in our response to Staff's brief. We note that PacifiCorp does agree with us that the Commission should address the questions the Supreme Court ruled were within the Commission's primary jurisdiction, including the question whether customers were harmed and, if so, by how much. If the Commission acquires authority to grant retroactive relief by the utility's consent, PGE hereby consents.

D. Response to URP's Brief

URP accuses us of changing our position. We have no choice but to bow before the adverse aspects of the *Dreyer* opinion, particularly its rejection of our understanding of ORS 757.225. URP should do the same and bow before the aspects of *Dreyer* that were adverse to its own position, i.e., that the class actions are *not* the superior way to resolve this dispute, that primary jurisdiction over it is here.

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[7] Phase 1 was intended to produce a Commission determination of what rates it would have set in 1995 if it had known how lawfully to set rates to recover retired capital assets.

E. Response to Brief of the Class Action Plaintiffs

We rely on our response to Staff's Brief for most of the points raised in the class action plaintiffs' brief.

One of the most persistent themes in their brief is that they have a supposedly better remedy in their class actions in circuit court, so the Commission should not do anything that might interfere with it. However, when they made this same argument to the Supreme Court in *Dreyer*, they *lost*. The Supreme Court ruled against them and stayed their class actions, holding that this Commission is the primary forum.

Another theme in their brief is that they reargue points that have already been decided against them by the Commission in these remand proceedings. As to these, we rely on what has already been said and decided.

Still another theme is the quoting of our own previous briefs where we argued that ORS 757.225 makes the rates established by the Commission conclusively lawful until they are changed, unless suspended by a court upon judicial review. Since we lost that argument in *Dreyer*, class action plaintiffs should not be urging the Commission to adopt a view of the law rejected at their urging. They now quote and adopt the very arguments and precedents they opposed successfully before the Supreme Court. *See, e.g.,* Class Action Plaintiffs Brief at 20 *et seq*. This is unseemly, and barred by the principle of judicial estoppel.

We respond to their other points as follows.

1. The Commission Can Redetermine Past Rates

As the Supreme Court said in *Hammond*, after the Commission's rate order has been set aside, the Commission's job is to try again to get it right. It is not *retroactive* ratemaking, it is getting the rates *right* for the first time, upon subsequent guidance from the Court of Appeals. As for whether new evidence is allowable, the statutes expressly allowed,

maybe even required, the reopening of the record to the extent that new evidence is appropriate to the Commission's task of getting the rates right. Former ORS 756.600.

2. The Commission Can Order Refunds for Past Customers as Well as Future Customers

It did so in *Katz*. Order No. 87-406 at 135-136. As *Katz* held, the Commission has the power to do all things necessary and convenient to the exercise of its jurisdiction.

V. CONCLUSION

The legislature enacted no statute that limits what the Commission can do after its rate order has been found improper under ORS 757.355 and remanded to the Commission. Neither has any Oregon court limited what the Commission can do under these unprecedented circumstances. The Commission's general powers under ORS 756.040 are therefore fully available.

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The answer to the question the Commission posed is that it has full power to grant remedies to PGE customers.

DATED this 20th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

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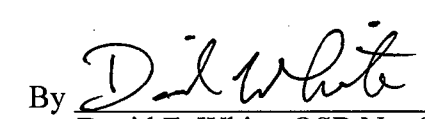
By 
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